Supreme Court, U.S.
FILED

041672 JUN 7 2005

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No. ——

In the Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,
Petitioner,

v.

ERRIC WALKER, on behalf of himself and all others similarly situated; STEVE RICKETTS, on behalf of himself and all others similarly situated; VICKIE ATCHLEY, on behalf of herself and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the validity of Petitioner's pre-dispute arbitration agreement which is a mandatory pre-requisite to employment at its national chain of family restaurants in the twenty-three (23) states where it does business. Due to the Sixth Circuit's failure to properly follow and apply the Federal Arbitration Act, this Petition presents the following larger questions with far-reaching implications for all businesses using pre-dispute arbitration agreements on a national basis:

1. May a Court of Appeals apply a heightened "knowing and voluntary" standard to give effect to the waiver of a jury trial necessarily contained within an agreement to arbitrate?

2. May a Court of Appeals subject standardized form arbitration agreements to extraordinary scrutiny in a search for grounds upon which to declare such agreements unenforceable under State contract law without thereby engaging in the very judicial hostility to arbitration agreements the Federal Arbitration Act was enacted to prevent?

3. May a Court of Appeals choose to apply the contract law of a single State to evaluate the validity of agreements to arbitrate entered into by individuals in all States, without regard for the contract law applicable to agreements formed elsewhere?

4. May a Court of Appeals refuse to enforce arbitration agreements based upon a perceived potential for structural bias in an arbitration system?

LIST OF PARTIES TO THE PROCEEDING

Parties to Proceeding

The Petitioner is Ryan's Restaurant Group, Inc. f/k/a Ryan's Family Steak Houses, Inc. The Respondents are former employees of Petitioner who brought this action, which arose under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*.

RULE 29.6 STATEMENT

Ryan's Restaurant Group, Inc. f/k/a Ryan's Family Steak Houses, Inc. is a publicly traded company which has no parent company and wholly owns the following subsidiaries: Big R Procurement Company, LLC, Fire Mountain Restaurants, Inc., Ryan's Properties, Inc. and Rymark Holdings, Inc. The Respondents are individuals with no corporate affiliations.

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PETITION FOR WRIT OF CERTIORARI

Ryan's Restaurant Group, Inc. f/k/a Ryan's Family Steak Houses, Inc. (hereinafter "Ryan's" or "Company") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 400 F.3d 370 (6th Cir. 2005). A Motion to Stay the Issuance of the Mandate pending the filing of a petition for writ of certiorari was denied without opinion. Unpublished Order issued March 31, 2005.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The arbitration agreements at issue are all subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.* Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,

transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case centers on the validity of a nationwide third-party arbitration system used by Ryan's for resolving disputes with its employees. The Court of Appeals' decision not only affects the immediate litigants as well as the tens of thousands other current Ryan's employees across the country where the Company transacts business[1], but more importantly, has a far reaching effect on every business which utilizes pre-dispute arbitration agreements on a national basis.

All applicants for employment with Ryan's are required to execute a "Job Applicant Agreement to Arbitration of Employment Related Disputes." The agreement to arbitrate completed as part of the application process is between the individual Ryan's employee and Ryan's third-party provider of alternative dispute resolution services, Employment Dispute Services, Inc. ("EDSI"). Ryan's is simply a customer of EDSI.

The United States District Court for the Middle District of Tennessee issued its Order on October 2, 2003, denying Ryan's Petition to Compel Arbitration in a putative nationwide wage and hour collective action brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") The District Court exclusively applied Tennessee

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[1] Ryan's has over 25,000 employees in its chain of family restaurants located in twenty-three (23) states.

contract law[2] and refused to enforce the written agreement to arbitrate because: (1) the agreement was lacking in consideration; (2) Ryan's failed to establish that the Respondents had "knowingly and voluntarily" waived their right to a jury trial; (3) there had not been mutual assent to the agreement; and (4) the agreement was an unconscionable adhesion contract. *See Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 929-36 (M.D. Tenn. 2003). The District Court additionally held that even assuming a valid contract to arbitrate existed, the agreement was nevertheless unenforceable because the arbitration forum used by Ryan's was hopelessly biased in favor of the Company. *See id.* at 924-28. The Sixth Circuit affirmed the District Court in all respects save the adhesion contract analysis on March 9, 2005. *See Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005).

The Petitioner is substantially aggrieved in four distinct ways:

1. The Court of Appeals applied a heightened "knowing and voluntary" waiver standard when passing upon the validity of Respondents' waiver of their right to a jury trial on their federal statutory claim. *See id.* at 381-83. The federal common law of arbitrability plainly states that all contracts are to be enforced according to their ordinary terms and, further, contracts to arbitrate should not be singled out for suspect status. After *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), it is well-established that federal statutory claims are appropriately adjudicated in arbitration.

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[2] Several of the opt-in Plaintiffs lived and worked outside Tennessee. Of course, an overwhelming number of the putative class members reside outside Tennessee.

By applying a heightened standard to determine if the Respondents knowingly and voluntarily waived their right to a jury trial, the Court of Appeals ignored the FAA and binding precedent from this Court, thereby adding to the split among the Circuits which currently exists with respect to the application of this amplified standard.

2. In further contravention of the FAA, the Court of Appeals applied ordinary state contract law in such a manner as to circumvent application of the FAA and the federal common law of arbitration promulgated thereunder. *See id.* at 378-84. In so doing, the Court of Appeals singled out the agreement for suspect status by subjecting it to higher scrutiny than other contracts.

3. The Court of Appeals violated both the Due Process and Full Faith and Credit Clauses when it upheld the application of Tennessee contract law in an exclusive fashion to invalidate the arbitration agreement at issue to employees nationwide, notwithstanding the fact that numerous state and federal jurisdictions had previously enforced the same agreements by rejecting the identical arguments seized upon by the Sixth Circuit. *See id.* at 377-78.

4. The decision of the Court of Appeals is inconsistent with controlling decisions from this Court establishing a liberal federal policy in favor of arbitration which was extended into the employment context beginning with *Gilmer*. In violation of *Gilmer*, the Court of Appeals entertained premature allegations of structural bias with Ryan's arbitration program which were speculative in nature. *See Walker*, 400 F.3d at 385-88.

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for a writ of certiorari should be granted for two (2) principal reasons. First, the Court of Appeals' decision squarely conflicts with both the FAA and controlling Supreme Court precedent. Second, the Court of Appeals committed error of constitutional proportions by its across the board application of Tennessee contract law to invalidate the arbitration agreement on a nationwide basis for purposes of the instant action and, in so doing, cavalierly ignored decisions from other state and federal jurisdictions that have expressly enforced the agreement.

I. May a Court of Appeals Apply a Heightened "Knowing and Voluntary" Standard to Give Effect to the Waiver of a Jury Trial Necessarily Contained Within an Agreement to Arbitrate?

Both the Sixth Circuit in this case and the Ninth Circuit in *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), have held that enforcement of any arbitration agreement, which of necessity entails the waiver of a judicial forum for the vindication of statutory employment discrimination claims, requires a "knowing and voluntary" waiver of an individual's right to a jury trial. *See Walker*, 400 F.3d at 381. This heightened standard has been expressly rejected by the Third Circuit. *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183-84 n.2 (3rd Cir. 1998). The Eighth Circuit appears to have done the same. *See Patterson v. Tenant Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997). The First, Fourth and Seventh Circuits have recognized the issue of whether a heightened standard is appropriate, but have expressly refused to decide it. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999); *Hooters of America, Inc.*

v. Phillips, 173 F.3d 933, 940 n.2. (4th Cir. 1999); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997).

A split among the Circuits therefore exists as to whether the application of the heightened standard is proper. That split should be resolved by this Court.

II. May a Court of Appeals Subject Standardized Form Arbitration Agreements to Extraordinary Scrutiny in a Search for Grounds Upon Which to Declare Such Agreements Unenforceable Under State Contract Law Without Thereby Engaging in the Very Judicial Hostility to Arbitration Agreements that the Federal Arbitration Act was Enacted to Prevent?

Enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts", *Gilmer* at 24, the FAA evinces the "liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Act's underlying policy is to guarantee the enforcement of private contractual arrangements. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Moreover, because Congress's preeminent purpose was to enforce private agreements, the Act requires courts to rigorously enforce agreements to arbitrate. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

The Act creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. *See Moses H. Cone Mem. Hosp.*, 460 U.S. at 26 n.32. This substantive federal law of arbitrability applies to

any arbitration agreement within the FAA's coverage. *See id.* at 24; *see also Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 271 (1995) (recognizing "that the Act set forth substantive law"); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (enforcing Section 2 of the FAA which "provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the [FAA]"); *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction . . .").

The substantive federal law of arbitration is a rare example of the type of situation in which this Court has held that federal common law should be adopted. These unusual circumstances "fall into essentially two categories: Those in which a federal rule of decision is 'necessary to protect uniquely federal interests;' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (internal citations omitted).

Once the decision is made that federal common law is applicable, the choice is often whether or not to displace the law of the forum state. 19 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* 2d § 4514 (1996). As Justice Scalia put it, "it might be simpler to conceptualize the issue as simply whether to apply a federal rule, which preempts rather than adopts the parallel state law, or to apply the law of the forum state." *Id.* at 459 (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994)). The applicable common law here, subject to exceptions outlined below, is that under the FAA, arbitration contracts are analyzed under the forum state's law if that law

arose to govern issues concerning the validity, revocability, and enforcement of contracts generally. *See Perry*, 482 U.S. at 492.

Because the Act establishes a "broad principle of enforceability," *Southland Corp.*, 465 U.S. at 11, a paramount principle under the common law of arbitration is that, in interpreting arbitration contracts, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25. This principle has also been referred to as the presumption of arbitrability under the FAA. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 77 n.1 (1998) (In discussing the presumption of arbitrability under the NLRA, this Court "also discerned a presumption of arbitrability under the FAA."). "Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract.' the Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal citations omitted).

While it is well-established that courts should consult state contract law principals to determine if a valid agreement to arbitrate exists in the first instance, *Cooper v. MRM Inv. Co.*, 367 F.3d at 498 (6th Cir. 2004), it is equally accepted that the liberal federal policy favoring arbitration must be taken into account even when conducting the state contract law analysis. *See id.* The FAA trumps state law, whether judicial or statutory in nature, which singles out arbitration agreements

for disparate treatment. The FAA also preempts state law of general applicability to the extent it is applied in a discriminatory fashion. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held that a district court may only consider the validity of the arbitration clause itself and may not entertain an attack on the enforceability of the underlying contract. *See id.* at 403-04. In so holding, the Court recognized that the ultimate question before it was whether "Congress may prescribe how federal courts conduct themselves with respect to the subject over which Congress plainly has power to legislate. The answer to that can only be in the affirmative." *See id.* at 405. The Court expressly rejected any argument that it was overstepping its bounds by refusing to allow courts to analyze the validity of the contract as a whole from a state contract law standpoint. *See id.* at 405-06. In essence, the Court held that the FAA gives federal courts the right to fashion substantive federal law of arbitration to determine the validity and scope of an arbitration agreement. *See id.* at 422 (Stewart, J., dissenting).

As this Court later recognized in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), "[S]tate law may nonetheless be preempted to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 489 U.S. at 477 (citation omitted). Given that the main thrust of the FAA is to "ensure that private agreements to arbitrate are enforced according to their own terms," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995), state law cannot be utilized to completely avoid the FAA. In his dissent in *Greentree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), Chief Justice Rehnquist argued that the FAA preempts not only that state

law applicable exclusively to arbitration, but generally-applicable state law to the extent necessary to enforce the parties' intention to arbitrate:

> But 'state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' The parties do not dispute that this contract falls within the coverage of the FAA. The 'central purpose' of the FAA is 'to ensure that private agreements to arbitrate are enforced according to their terms.' In other words, Congress sought simply to 'place such agreements upon the same footing as other contracts.' This aim 'requires that we rigorously enforce agreements to arbitrate,' in order to 'give effect to the contractual rights and expectations of the parties.'

Bazzle, 539 U.S. at 457-58. (Rehnquist, C.J., dissenting) (citations omitted).

The foregoing principles are critical to establishing a uniform substantive law relating to the enforcement of arbitration agreements throughout the United States. Without it, employers and other entities utilizing arbitration agreements on a multi-state basis are faced with a patchwork of inconsistent decisions concerning the enforceability of their arbitration programs. Enforceability of an arbitration program should not depend on what State in which a claimant resides. The Court of Appeals' tortured application of black letter contract law principles to avoid the enforcement of a form agreement to arbitrate is contrary to the policy considerations which led to enactment of the FAA. If allowed to stand, this ruling will create a great deal of uncertainty for

any company using an arbitration agreement on a national basis. Those courts which adopt a paternalistic view in shielding individuals from their obligation under freely executed contracts will be able to skirt the FAA by their disparate scrutiny of arbitration agreements to find some defect in contract formation just like the Court of Appeals did here.

As this Court recognized in *Gilmer* and *Allied-Bruce*, the FAA was enacted to overcome courts' traditional hostility to arbitration agreements. In deciding *Southland*, this Court concluded the FAA trumps any state law hostile to arbitration because Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. *Allied-Bruce*, 513 U.S. at 271-72; Southland Corp., 465 U.S. at 16.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court re-affirmed the principle first enunciated in *Gilmer* that the advantages of the arbitration process do not disappear when applied in the employment context and then recognized the inherent unfairness in allowing a national arbitration program's viability to depend upon the jurisdiction in which a case happened to arise:

> The considerable complexity and uncertainty that the construction of Section 1 urged by Respondents [to the effect that the FAA does not apply in the majority of employment contexts] would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's pre-arbitration

> purposes and 'breeding litigation from a statute that seeks to avoid it.'

532 U.S. at 123 (citing *Allied-Bruce*, 513 U.S. at 275). Both *Circuit City* and *Allied-Bruce* stand for the proposition that states should not be allowed to indirectly accomplish that which cannot be done directly.

In stark contrast to the Court of Appeals ruling under scrutiny in this Petition, both the Seventh and Eighth Circuits have recognized that the FAA likely trumps facially neutral state contract law if applied in a discriminatory fashion to defeat arbitration agreements. *See Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999) (recognizing that even if Illinois law would regard the arbitration provision under scrutiny as unconscionable, the FAA would nevertheless preempt such a law); *Webb v. R. Rowland & Co.*, 800 F.2d 803 (8th Cir. 1986) (implying that the FAA preempts state law in determining whether an arbitration agreement was invalid as a contract of adhesion).

The Seventh Circuit applied the proper analysis in *Oblix, Inc. v. Winiecki*, 374 F.3d 488 (7th Cir. 2004), where the employee attempted to avoid an arbitration clause in her employment contract on the grounds that it was an unconscionable contract of adhesion presented on a take it or leave it basis. *See* 374 F.3d at 490. The employee additionally argued that the agreement lacked mutuality because the employer reserved the right to go into court to enforce certain provisions. *See id.* at 490-91. The Seventh Circuit reversed the trial court's refusal to enforce arbitration, finding that the arguments adopted by the district court to enforce arbitration were no different than similar arguments rejected all the time to defeat arbitration in other contexts. *See id.* at 491-92. In so holding, the court recognized that

standard form agreements are a fact of life and must be either uniformly enforced or invalidated whether they be found in an employment contract or a lease. *See id.* The court reasoned that even generally applicable and facially neutral state contract law is pre-empted by Section 2 of the FAA if it is applied in a discriminatory manner to defeat arbitration agreements: "If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is pre-empted by Section 2 of the FAA." *Id.* at 492 (citing *Southland Corp.*, 465 U.S. at 1; *Allied-Bruce*, 513 U.S. at 271-72.)

The Court of Appeals in this case applied generally applicable Tennessee contract law in an discriminatory manner to defeat this particular arbitration agreement because of speculative concerns the EDSI arbitration forum might produce an unfair result for the Respondents. In finding no valid contract to arbitrate existed, the Court of Appeals held that the contract lacked consideration, citing its prior decision in *Floss v. Ryans's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000). The Sixth Circuit in *Floss* held the same agreement lacked consideration because EDSI retained the discretion to amend its rules if necessary; and therefore, might change its rules tomorrow to provide for unfair procedures. *See Walker*, 400 F.3d at 378-79. This result could only be reached by applying the common law of contracts in a contrived fashion because it rests upon the theoretical possibility that EDSI might at some time in the future exercise its discretion to amend its rules[3] in order to

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[3] The American Arbitration Association (AAA) retains the same discretion to amend its rules without notice. Rule 1 of the AAA National Rules for the Resolution of Employment Disputes.

provide would be claimants with a coin toss, foot race or some other arbitrary and capricious means of dispute resolution. Not only does this ruling completely ignore the federal prohibition on speculating as to the neutrality of an arbitral forum as discussed more fully below, it absolutely exceeds any boundary of reasonableness in the application of law. It is nothing more than the purposeful misapplication of state law to avoid the FAA.

As further evidence of the extraordinary scrutiny reserved for contracts requiring arbitration, the Court of Appeals rejected any notion that Ryan's consideration of a potential employee's application was sufficient, although it recognized that, under the standard enunciated in the Restatement (Second) of Contracts § 71(4), Ryan's could have provided the requisite consideration. *See id.* at 379. The Court of Appeals, however, declared that Ryan's did not provide *enough* consideration. *See id.* at 380-81. This conclusion completely ignores those Tennessee cases adopting the well-recognized contract law principle that if consideration is present and there is no evidence of fraud, it is not proper for a court to scrutinize the quantum of consideration. *See Townson v. Neuhardt*, 203 S.W. 255 (Tenn. 1918) (stating that to support a contract, consideration does not have to be adequate; it need only be valuable); *Woodward v. Bruce*, 339 S.W.2d 143 (Tenn. Ct. App. 1960) (recognizing that mere inadequacy of consideration in itself, unaccompanied by circumstances raising a presumption of fraud, is not sufficient grounds to set aside a contract unless the inadequacy of

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Indeed, the New York Stock Exchange (NYSE) program which passed muster in *Gilmer* utilizes rules and procedures that are unilaterally subject to change as well. NYSE Const. Art. XI, Sec. 2.

consideration is gross and manifest); *Farrell v. Third Nat'l Bank*, 101 S.W.2d 158 (Tenn. Ct. App. 1936) (holding that a contract generally will not be set aside for mere inadequacy of consideration, particularly where the parties contract with knowledge of what they are doing).

The Court of Appeals additionally held no valid agreement to arbitrate existed due to a lack of mutual assent. *See Walker*, 400 F.3d at 383-84. This holding was predicated upon the fact that the arbitration agreement was essentially presented on a take it or leave it basis to individuals with limited education and bargaining power. *See id.* at 384. Again, the Court of Appeals applied contract law in a discriminatory manner to defeat this particular agreement. Not only is the holding in direct contravention with the well-established Tennessee law that all individuals are presumed to know the contents of every contract they sign and proceed at their own peril if they fail to do so, *see e.g. Giles v. Allstate Ins. Co.*, 871 S.W.2d 154, 156-57 (Tenn. Ct. App. 1993), no contract would ever be enforceable if presented by a large corporation to an individual of limited education and means.[4]

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[4] The length to which the Court of Appeals impermissibly stretched contract law to reach a desired result is further demonstrated when viewed in conjunction with a recent decision from a different Panel of the Sixth Circuit, *Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th Cir. 2004). In that case, the Panel rejected a similar assault on the pre-employment arbitration agreement used by a Kentucky Fried ("KFC") Chicken franchisee. Specifically, the Panel in *Cooper* refused to find the KFC agreement was adhesive because the plaintiffs submitted no evidence that other job opportunities were unavailable to them elsewhere, finding it no different than arbitration agreements which the courts of Tennessee had enforced in other contexts. *See id* at 500-03 (citing *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001) (arbitration

The form agreement used by the termite company in *Allied-Bruce* would never have survived scrutiny under this standard. Nor would the arbitration clause approved in *Gilmer*. *See Gilmer*, 500 U.S. at 32-33 (holding that inequality of bargaining power does not render an arbitration agreement invalid).

Ryan's respectfully submits that the instant case presents this Court with the opportunity to address the last real unresolved issue concerning employment arbitration and the FAA: To what extent may a court subject an arbitration agreement to extraordinary scrutiny in a search for grounds upon which to decline to enforce such form agreements,

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agreement between car dealer and buyer)); *Wallace v. National Bank of Commerce*, 938 S.W. 2d 684 (Tenn. 1997) (form agreement between bank and customer for imposing fees on returned checks)). Even had the agreement been adhesive in nature, the Panel refused to find it unconscionable simply because it was the product of inequality in bargaining power between an employer and a minimum wage employee. *See id.* at 504-05. While the Panel found the district court's compassion for job applicants to be "laudable", the court rightfully concluded that "under [the district court's] approach 'practically every condition of employment would be an 'adhesion contract' which could not be enforced because it would have been presented to the employee by the employer in a situation of unequal bargaining power on a 'take it or leave it' basis.'" *Id.* at 505 (citing *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 823 (S.D. Ohio 1999), *aff'd on other grounds*, 317 F.3d 646 (6th Cir. 2003)). The Panel also rejected the contention that the agreement lacked bilaterality or mutuality of assent because both employee and employer were bound by its provisions and, moreover, no evidence was presented that the employee was unaware of the legal agreement's legal ramifications. *See id.*

without thereby engaging in the very judicial hostility to arbitration agreements that the FAA was enacted to prevent?

III. May a Court of Appeals Choose to Apply the Contract Law of a Single State to Evaluate the Validity of Agreements to Arbitrate Entered Into by Individuals in all States, Without Regard for the Contract Law Applicable to Agreements Formed Elsewhere?

The Court of Appeals affirmed a finding that the arbitration agreements at issue were invalid under Tennessee law, not only with respect to the Respondents and the other individual opt-in Plaintiffs to date residing in the State of Tennessee, but by necessary implication, every single Ryan's employee residing in the twenty-two (22) other states where Ryan's does business. This alone was error because it violated Tennessee's general adherence to the doctrine of *lex loci contractus*. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 499 (6th Cir. 2004) (applying Tennessee law).

Of greater concern and with much farther reaching implications, at the same time the District Court denied Ryan's Petition to Compel Arbitration, it ordered class notice issued to all "similarly situated" individuals without providing guidance as to who those "similarly situated" individuals were. Assuming that the District Court ordered notice be sent to all Ryan's employees, that encompasses every Ryan's employee nationwide. By way of example, that ruling, as affirmed in virtually all respects by the Court of Appeals, has the practical effect of using Tennessee state contract law to invalidate an arbitration agreement signed by a North Carolina employee in North Carolina, despite the fact that a North Carolina state court previously ruled the agreement valid and enforceable. *See Scruggs v. Eric Boswell and*

Ryan's Family Steak Houses, Inc., No. 01-CVS-691 (N.C. Super. Ct. Nov. 2, 2001), *cert. denied*, No. COAP01-924 (N.C. Ct. App. Dec. 28, 2001).

Ryan's respectfully submits that this was an error of constitutional proportions which implicates the dual concerns of federalism and comity at their core. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding that both the Due Process Clause and the Full Faith and Credit Clause were violated where Kansas law was applied across the board to a nationwide class action comprised of owners of certain warranty contracts arising out of natural gas leases where 99% of the class members resided outside Kansas).

The Court of Appeals rejected Ryan's assignment of error concerning the exclusive application of Tennessee law, reasoning that Ryan's failed to point to any real difference between the contract law of Tennessee and the other states in which Ryan's does business. *See Walker*, 400 F.3d at 377-78. Although Ryan's was not required to make that showing, *see Parkway Baking Co., Inc. v. Freihofer Baking Co., Inc.*, 255 F. 2d 641, 646 (3rd Cir. 1958) (holding the federal courts are required to take judicial notice of applicable law); *Schultz v. Tecumseh Products*, 310 F.2d 426 (6th Cir. 1962) (specifically endorsing the *Parkway Baking* decision), Ryan's repeatedly demonstrated real, and not just hypothetical, conflict.

At the outset, the ruling below demonstrates the Circuit split of authority that currently exists with respect to this agreement. Both the Eighth and the Eleventh Circuits have enforced this arbitration agreement. *See Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001); *Hudson v. Ryan's Family Steak Houses, Inc.*, No. 99-13120-DD (11th Cir. Apr. 5, 2000). In addition, the Ryan's

arbitration program has been found valid and enforceable by federal district courts in the Fourth, Fifth and Tenth Circuits.[5] *See Tenaglia v. Ryan's Family Steak Houses, Inc.*, No. 4:02-2684-25BH (D.S.C. May 9, 2003); *Gardner v. Ryan's*, No. 1:01-V-0030, 2001 WL 1352113 (W.D.Va. Oct. 31, 2001); *Campbell v. Ryan's Family Steak Houses, Inc.*, No. 2:99-CV-052-PB, 2000 U.S. Dist. LEXIS 2460 (M.D. Miss. Feb. 28, 2000); *Rich v. Golden Corral Corp.*, No. CIV-99-1527-C (W.D. Okla. Feb. 16, 2000); *cf. Brown v. Ryan's Family Steak Houses, Inc.*, No. 04-1351 (4th Cir. Oct. 29, 2004) (excusing minor from her obligation to arbitrate because her legal guardian was mentally incompetent at the time she signed the agreement on behalf of the minor child and expressly refusing to address the lower court's finding of bias in the EDSI system).

With the Sixth Circuit's decision in place, the enforceability of the Ryan's arbitration program depends solely on geography. This is nothing short of arbitrary. Prospective implications for the arbitration program aside, the exclusive application of Tennessee law to this presumably nationwide dispute was error, and more importantly, squarely conflicted with decisions from numerous state and federal tribunals which have specifically enforced the agreement.

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[5] The agreement has also been enforced by state trial and appellate courts in North Carolina, South Carolina and Louisiana. *See Scruggs v. Eric Boswell and Ryan's Family Steak Houses, Inc.*, No. 01-CVS-691 (N.C. Super. Ct. Nov. 2, 2001), *cert. denied*, No. COAP01-924 (N.C. Ct. App. Dec. 28, 2001); *Drayton v. Ryan's Family Steak Houses, Inc.*, No. 2000-P-22-691 (S.C. Ct. Common Pleas Aug. 7, 2001); *Stadtlander v. Ryan's Family Steak Houses, Inc.*, No. 34000384-CA, 2001 La. App. LEXIS 687 (La. Ct. App. 2d Cir. Apr. 4, 2001).

The Court of Appeals found that the Agreements in question lacked consideration, as it previously had ruled in *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000). *See Walker*, 400 F.3d at 378-79. The Sixth Circuit in *Floss* reasoned the EDSI agreement lacked consideration because EDSI retained the discretion to modify or amend its rules and procedures if necessary. Without acknowledging that the American Arbitration Association and others similarly retain the discretion to modify their rules of procedure, the Court of Appeals declared that because it was possible that EDSI would arbitrarily change its rules at some time in the future to provide for an unfair method of adjudication the consideration supplied by EDSI in the form of a venue and rules was insufficient consideration for the employee's promise to arbitrate. *See Floss*, 211 F.3d at 315-16. This reasoning has been expressly rejected by state and federal courts in Virginia, North Carolina, Tennessee, South Carolina and Mississippi. *See Tenaglia v. Ryan's Family Steak Houses, Inc.*, No. 4:02-2684-25BH (D.S.C. May 9, 2003); *Mahan v. Ryan's Family Steak Houses, Inc.*, No. 4:02-CV-82 (E.D. Tenn. Jan. 29, 2003); *Scruggs v. Eric Boswell and Ryan's Family Steak Houses, Inc.*, No. 01-CVS-691 (N.C. Super. Ct. Nov. 2, 2001), *cert. denied* No. COAP01-924 (N.C. Ct. App. Dec. 28, 2001); *Gardner v. Ryan's*, No. 1:01-CV-0030, 2001 WL 1352113 (W.D. Va. Oct. 31, 2001); *Campbell v. Ryan's Family Steak Houses, Inc.*, No. 2:99-CV-052-PB, 2000 U.S. Dist. LEXIS 2460 (M.D. Miss. Feb. 28, 2000).

The *Floss* decision aside, the Court of Appeals also rejected any notion that Ryan's evaluation of an individual's application for employment and ultimate hire supplied consideration for the promise to arbitrate. *See Walker*, 400 F.3d at 379-81. A district court in South Carolina held that Ryan's offer of employment, standing alone, provided

sufficient independent consideration to uphold the agreement without the need to scrutinize the employee - EDSI relationship for legal consideration. *See Tenaglia v. Ryan's Family Steak Houses, Inc.*, No. 4:02-2684-25BH (D.S.C. May 9, 2003).

The Court of Appeals also affirmed a finding that the agreement lacked mutuality of assent because it was presented to minimum wage individuals on a take it or leave it basis. *See Walker*, 400 F.3d at 383-84. Similar reasoning has been rejected by courts in Virginia, South Carolina, North Carolina, Louisiana, as well as by the Eighth Circuit Court of Appeals where it has been held the agreement at issue is not an unconscionable contract of adhesion. *See Lyster*, 239 F.3d at 937; *Tenaglia v. Ryan's Family Steak Houses, Inc.*, No. 4:02-2684-25BH (D.S.C. May 9, 2003); *Scruggs v. Eric Boswell and Ryan's Family Steak Houses, Inc.*, No. 01-CVS-691 (N.C. Super. Ct. Nov. 2, 2001), *cert. denied* No. COAPO1-924 (N.C. Ct. App. Dec. 28, 2001); *Gardner v. Ryan's,* No. 1:01-CV-0030, 2001 WL 1352113 (W.D. Va. Oct. 31, 2001) *Drayton v. Ryan's Family Steak Houses, Inc.*, No. 2000-CP-22-691 (S.C. Cir. Ct. Aug. 7, 2001); *Stadtlander v. Ryan's Family Steak Houses, Inc.*, No. 34000384-CA, 2001 La. App. Ct. LEXIS 687 (La. Ct. App. 2d Cir. Apr. 4, 2001).

The Court of Appeals dismissed the foregoing demonstration of real, material conflict between the law of Tennessee and that of other jurisdictions. At the same time, it added to the split among the Circuits concerning the enforceability of Ryan's arbitration agreement.

IV. May a Court of Appeals Refuse to Enforce an Arbitration Agreement Based Upon a Perceived Potential for Structural Bias in an Arbitration System?

The Court of Appeals found the EDSI arbitration forum to be hopelessly biased due to the financial connection between the Company and EDSI in the form of the customer-vendor relationship. *See Walker*, 400 F.3d at 385-88. The Court of Appeals reasoned EDSI must stack the deck with management-friendly individuals in order to keep the Ryan's business. At the time of the decision, no arbitration proceedings had been instituted, much less had arbitrators been empaneled. The Court of Appeals erred by entertaining premature concerns of bias based wholly upon speculation. At most, the record demonstrated a purely speculative potential for bias that had yet to manifest itself. Those concerns should have been raised in a post-award attack under the framework set forth in the FAA under 9 U.S.C. § 10, as this Court recognized in *Gilmer*.

In *Mitsubishi Motors Corp.*, the party resisting arbitration called the competency of the panel into question given the complexities of anti-trust law in an attempt to invalidate the arbitration provision in its contract. The court rejected this attempt: "We . . . have no occasion to speculate on this matter at this state of the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award." *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19. This language is significant in that it signals the Supreme Court's mandate that there is no need in the present to resolve what *may* rise (but has not yet) to the level of a potential objection to an arbitral proceeding which has not even been conducted. Furthermore, the Court noted, "[h]aving permitted the arbitration to go forward, the national courts of

the United States will have the opportunity at the award-enforcement stage to ensure that a legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638; *see also McMahon*, 482 U.S. at 232 ("We have concluded that there is no reason to assume at the outset that arbitrators will not follow the law.")

In *Gilmer*, this Court discussed claims of arbitral bias after first reiterating the strong, liberal federal policy in favor of arbitration, which refuses to recognize speculative claims of bias. It is clear that unsubstantiated allegations of bias must be raised in a post-award attack under section 10 of the FAA: "The FAA also protects against bias, by providing that courts may overturn arbitration decisions '[w]here there was evident partiality or corruption in the arbitrators.' There has been no showing in this case that those provisions are inadequate to guard against *potential bias*." *Gilmer*, 500 U.S. at 30-31 (emphasis added) (internal citations omitted); *see also Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 487 (5th Cir. 2002) (recognizing that fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration review set forth in Section 10 of the FAA); *Smith v. American Arbitration Assoc., Inc.*, 233 F.3d 502, 506 (7th Cir. 2000) (finding suit challenging arbitration on ground of bias was premature before arbitration was completed; the time to challenge arbitration on any ground is when arbitration is completed and an award rendered); *Folse v. Richard Wolfe Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) ("By its own terms, Section 10 authorizes court action only after a final award is made by the arbitrator."); *Michaels v. Mariforum Shipping, S.A.*, 624 F. 2d 411, 414 n.4 (2d Cir. 1980) ("[I]t is well-established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award");

Crim v. Pepperidge Farm, Inc. 32 F. Supp. 2d 326, 330 (D. Md. 1999) (stating arbitrators should be afforded the opportunity to "demonstrate that they will participate in the arbitration process in a fair, honest and good-faith manner. . . . If the parties are allowed to challenge the arbitrator chosen by their opponents based merely on the appearance of impropriety before [the arbitration] . . . then the floodgates to litigation will be open."); *Hoffman v. Cargill, Inc.*, 968 F. Supp. 465, 475-76 (M.D. Iowa 1997) (holding that while the court had serious concerns about the fairness of the arbitration rules, the court was nevertheless without power to interfere with the arbitration proceeding until after the conclusion of the arbitral proceedings); *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 833 (S.D.N.Y. 1996), *aff'd* 110 F.3d 892 (2d Cir. 1997) (allowing a pre-award attack based upon allegations of potential bias would invite endless litigation and further noting that "[i]n most cases it is inappropriate and difficult to determine the partiality of an arbitrator absent an award that reflects alleged bias."). As indicated by this Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000), the party resisting arbitration is the one who bears the burden of proving the deficiency in the arbitral forum, but here the Court of Appeals placed the burden on Ryan's to prove the adequacy of that forum, in advance. The Court of Appeals pointed to the financial connection[6] between Ryan's and EDSI as sufficient evidence of bias which warranted scrutiny of the EDSI arbitration system at the outset. *Walker*, 400 F.3d 386-87.

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[6] In addition to the EDSI-Ryan's financial relationship, the Court of Appeals additionally based a finding of structural bias on the limited discovery available in the EDSI forum. Of course, limited discovery is a common feature of arbitration and is considered positive in that it streamlines the adjudication process and keeps the costs down for all parties. *See Gilmer*, 500 U.S. at 31.

The question then becomes one of whether this financial connection, standing alone, is enough to invalidate an arbitration program before arbitrators are ever empaneled, much less given an opportunity to rule. Definitive guidance is needed from the Court on this issue.

Not only was the consideration of potential bias premature as argued above, the Court of Appeals impermissibly predicated its finding of bias on speculation and conjecture. As an alternative basis for affirming the District Court below, the Court of Appeals held the arbitration forum provided by EDSI failed to provide the Respondents with an effective forum for the vindication of their federal statutory rights under the FLSA. Upon evidence limited to the fact that Ryan's is EDSI's largest customer, the Court of Appeals concluded that structural bias must surely exist, suggesting that EDSI is predisposed to manipulate the arbitration process in a manner which guarantees favorable results for Ryan's. *See Walker*, 400 F.3d at 386.

In sharp contrast, the First, Seventh and Ninth Circuits have expressly declined to find structural bias predicated solely upon a financial relationship in other arbitration contexts. The Seventh Circuit rejected a similar structural bias attack on the National Grain and Feed Association arbitration program where the defendant grain elevators were all members of the organization designated to hear disputes. *See Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000).

In *Rosenberg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999), the plaintiff/employee alleged that the New York Stock Exchange arbitration system was biased against employees and in favor of routine litigants - - the employers. The First Circuit rejected this argument, holding that the employee failed to demonstrate either actual bias or structural infirmities

in the arbitration system. According to the First Circuit, under *Gilmer*, arbitration should be ordered unless there has been some showing of actual bias. *See Rosenberg*, 170 F.3d at 38.

In *Woods v. Saturn Distribution Corp.*, 78 F.3d 424 (9th Cir. 1996), a Saturn automobile dealer attacked the arbitration provision in its dealer franchise agreement with Saturn because its rules dictated that the arbitration panel consist entirely of Saturn dealers and Saturn employees. The plaintiff argued that as dealers and employees of the company, the arbitrators were inclined to rule from the start in favor of Saturn. *See Woods*, 78 F.3d at 428. The court rejected this argument, finding that naked allegations of bias based upon a financial relationship alone were insufficient to scuttle the Saturn arbitration program. *See id.* at 428-29.

This Court of Appeals' decision also conflicts with this Court's pronouncement on the enforceability of arbitration agreements in the employment context. In *Gilmer*, the Court rejected generalized attacks on arbitration that rested "on suspicions of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Gilmer*, 500 U.S. at 20. The *Gilmer* Court expressly rejected allegations that the NYSE arbitration program failed to provide Gilmer with an effective forum for the vindication of his federal statutory civil rights because the defendant employer was a member of the stock exchange -- the very body providing the arbitration forum. *See id.* at 30. Other decisions from this Court are in accord. *See Mitsubishi Motors Corp.*, 473 U.S. at 614 (rejecting speculation that the arbitrators would be unable to understand and apply complex anti-trust law); *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003) (reversing lower court's refusal to compel arbitration based upon the sheer possibility that an arbitrator

might interpret the arbitration agreement at issue in such a way as to prohibit the award of enhanced damages under RICO); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 405 (1995) ("Mere speculation that foreign arbitrators *might* apply Japanese law which depending on the proper construction of [the Carriage of Goods by Sea Act], *might* reduce Respondents' legal obligations, does not in and of itself lessen liability under [the Act] nor does it provide adequate basis upon which to declare a relevant arbitration agreement unenforceable.") (emphasis in original)).

Moreover, in arriving at a finding of structural bias with respect to EDSI, the Court of Appeals pointed to the lack of criteria for the qualification, selection and assignment of individual arbitrators. *See Walker*, 400 F.3d at 387. In violation of *Gilmer*, the Court of Appeals assumed the worst and reasoned that management-friendly arbitrators would be appointed as a result. The Court of Appeals additionally noted that the company providing one of the three panel members, Resolute Systems, Inc., was an unknown entity based upon the record before it. *See id.* In violation of this Court's admonition in *Gilmer*, the Court of Appeals assumed the worst and reasoned that the Resolute System arbitrators surely must be biased as well. In further violation of *Gilmer*, the Court of Appeals also failed to consider adequately the procedural safeguards built into the EDSI system, *Gilmer*, 500 U.S. at 30-32, which the Seventh Circuit previously ruled were in line with other arbitration systems which have passed constitutional muster. *See Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 758 (7th Cir. 2000).

The Court of Appeals prematurely presumed bias in contravention of the FAA and *Gilmer*. This was error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 7, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-6468

[Filed, March 9, 2005]

ERRIC WALKER, STEVE RICKETTS, and VICKIE ATCHLEY, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,	)
v.	)
RYAN'S FAMILY STEAK HOUSES, INC., Defendant-Appellant.	)

OPINION

CLAY, Circuit Judge. Defendant Ryan's Family Steak Houses, Inc. appeals the October 2, 2003 order of the district court, denying its motion to dismiss and petition to compel arbitration, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4, of Plaintiff Erric Walker's, Steve Ricketts', and Vickie Atchley's claims for violations of the Fair Labor

Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219. For the reasons that follow, we **AFFIRM**.

I.

A. Procedural History

On November 12, 2002, Plaintiffs Erric Walker, Steve Ricketts, and Vickie Atchley filed a self-styled "collective action" complaint for violations of the FLSA against Defendant Ryan's Family Steak Houses, Inc. ("Ryan's") in the United States District Court for the Middle District of Tennessee. Ryan's is a Delaware corporation, with its principal place of business in South Carolina, and owns and operates a chain of over 300 restaurants in 22 states. Plaintiffs, former employees at various Ryan's locations in Tennessee, allege that Ryan's failed to pay them the minimum wage and/or one-and-one-half their regular rate of pay for all hours worked in excess of each 40 hour work week, in violation of the FLSA. After Plaintiffs filed suit, 18 additional unnamed plaintiffs filed their consent to become party plaintiffs in the lawsuit. Ryan's moved to dismiss Plaintiffs' complaint and petitioned for an order compelling Plaintiffs to arbitrate their claims pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3 and 4. Ryan's argued that Plaintiffs federal court claims were foreclosed by the arbitration agreements that each had executed at the outset of their employment.

On October 2, 2003, the district court denied Ryan's motion, holding that there was inadequate consideration for the arbitration agreements, the agreements had the hallmarks of unconscionable adhesion contracts, the agreements were not founded upon mutual assent, and Plaintiffs did not knowingly and voluntarily waive their constitutional right to

a jury trial. The court also held that the arbitration forum provided for in the agreements is not able to provide for effective vindication of statutory claims and is an inappropriate substitute for the judicial forum. The court observed that the pool of arbitrators would be constituted in a biased manner and that the limited discovery available in the forum suggested structural bias in favor of the employer. The court further determined that the arbitration agreements appear to prohibit arbitration of class-based claims, which provides a powerful disincentive for employees to pursue individual claims of relatively low monetary value. Ryan's timely appealed.

B. Substantive Facts

Since 1996 or 1997, any individual who applies for employment with Ryan's has been presented with a 12-page application packet. The second page of the packet notifies the applicant that he or she is required to complete and sign the "Job Application Agreement to Arbitration of Employment-Related Disputes" (hereafter "Arbitration Agreement") in order to be considered for a position. Failure to sign and accept the Arbitration Agreement and its related rules and procedures purportedly terminates the job application process. After the one-page notice come five pages of single-spaced rules and procedures governing the arbitration procedure. Only after wading through the rules does the applicant get to the one-page job application for the positions of server, salad bar, dishwasher, frontline, hostess, meatcutter, cook, breadroom, or cashier. The two-page Arbitration Agreement, which the applicant must sign, then follows the application.[1]

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[1] Named Plaintiff Vickie Atchley executed her agreement in 1994. At that time, the Arbitration Agreement was not included in the

Plaintiffs cite several examples of applicants who were hired on the spot after a 15 to 20 minute interview, during which the hiring manager hurriedly presented them with various documents that they were instructed to sign in order to be considered for a job. The manager rarely explained the nature of the Arbitration Agreement to the applicants, nor were the applicants given the opportunity to take home and review any of the forms before signing or provided with copies of the executed Arbitration Agreement or rules. Consequently, many of the applicants do not even recall executing the agreements.

One Ryan's employee, Nanella Dukes, was hired on the spot, without filling out any paperwork. Only after working for four or five days was Dukes handed the application packet and told to sign the documents, with her manager explaining that the agreement meant that if Dukes "ever had any problems with Ryan's or Ryan's management, [she] had to 'go through Ryan's arbitration.'" Plaintiffs Julie Oaks and Steven Ricketts also were hired on the spot without first completing the Arbitration Agreement. Oaks's manager explained that the arbitration agreement meant that if Oaks ever had any problems with Ryan's, she "had to 'go through Ryan's ' before [she] could go to an attorney."

According to Dukes, based on her experience conducting new employee orientations, Ryan's managers would place an "x" in every spot an applicant was required to sign, and applicants would be instructed to sign every "x" without any explanation. Dukes's explanation of the application process is

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same package of documents as the employment application. Plaintiffs Walker and Ricketts executed their agreements in 2000 and 1998, respectively.

consistent with that of Paul Heuther, who worked as a manager at various Ryan's restaurants over a ten-year period. Heuther states that the application process typically would last no longer than 20 minutes, applicants often would be hired on the day that they applied when managers presented the application packet, they would simply tell the applicants that if they wanted a job, "sign these documents here." Heuther further explains, "Our supervisors at Ryan's told us during manager meetings with them, that if it came up to tell any job applicant that the arbitration agreement meant that problems would be handled 'up the chain of command,' and that we would handle problems 'in house' first, and if the problem could not be resolved there, then it would be taken to the supervisor to resolve."

Plaintiffs complain that the time-limited context in which they were presented with the Arbitration Agreement, combined with the managers' provision of misleading information about the agreement, is particularly problematic because many of the plaintiffs have not completed high school and/or were in dire financial circumstances at the time of application and therefore were desperate for the low-wage jobs Ryan's offers. Plaintiffs point out that the average annual salary for a top-paid Ryan's restaurant worker is approximately $16,000, while minimum wage employees make approximately $11,000 annually. Accordingly, Plaintiffs suggest that they had neither the ability nor the incentive to comprehend the significance of executing the Arbitration Agreement.

Unlike the typical pre-employment arbitration agreement which involves a contract between the applicant and his or her potential employer, Ryan's Arbitration Agreement is not between the applicant and Ryan's. Rather, it is between the applicant and Employment Dispute Services, Inc. ("EDSI").

EDSI is a South Carolina corporation whose sole business is the marketing and administration of the Employment Dispute Resolution Program. The program is a third-party arbitration system which was established in 1992 to provide employers and employees outside of the securities industry with a purportedly fair and expeditious means of resolving employment-related disputes. EDSI has contracts with a total of seven companies, including Ryan's.

The Arbitration Agreement that Plaintiffs executed explains that Ryan's (referred to therein as the "Company") had entered into a separate agreement with EDSI "to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company." Although Plaintiffs were not provided with a copy of Ryan's separate agreement with EDSI, that agreement obligates EDSI to, *inter alia*, "administer and provide access to the EDSI alternative dispute resolution procedures and forum for all Company job applicants, employees, and the Company itself, as provided in the EDSI Rules and Procedures"; train managers and supervisors about the alternative dispute resolution program; and train managers and employees selected to serve as potential "adjudicators" in the program. Also, for an additional fee, EDSI will conduct "an employee relations audit (personnel polices and procedures, handbooks and other personnel forms), management training, and employee attitude surveys with recommended management responses." Ryan's agreement with EDSI is renewable from year to year, but Ryan's may cancel the contract with ten days' written notice.

By executing the Arbitration Agreement with EDSI, Plaintiffs agreed to (a) bring any employment disputes that he or she may have against Ryan's and that would otherwise be decided in a state or federal court only in EDSI's arbitral

forum[2] and (b) be bound by a final decision of the EDSI arbitration panel. The purported consideration for Plaintiffs' promise to arbitrate is EDSI's agreement "to provide an arbitration forum, Rules and Procedures, and a hearing and decision based on any claim or dispute [that the applicant] may file or defend[.]" According to the agreement, Ryan's is a third party beneficiary of the agreement between Plaintiffs and EDSI, and Plaintiffs are third party beneficiaries of Ryan's agreement with EDSI. The agreement continues for the period of Plaintiffs' employment with Ryan's, unless mutually terminated in writing by Plaintiffs and EDSI.

The 2000 version of EDSI's Employment Dispute Resolution Rules and Procedures - the most recent version of the rules - provides that the substantive rights and remedies in EDSI's arbitration forum are the same as are available in a federal or state court. The rules govern all legal disputes, claims, or causes of action that arise out of the employment or possible employment of all parties signatory to an employment dispute resolution agreement with EDSI. The rules govern both the claims of a "claimant" (i.e., an applicant or employee) and any claims that a signatory defendant might bring against a claimant who has signed the Arbitration Agreement.[3]

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[2] Employment claims or charges handled by a state or federal agency are exempted from the agreement.

[3] The rules applicable from 1993 through 1998 state that they apply to resolve disputes involving individual or employer claims and/or claims of several parties, "including group or class actions." EDSI excised the reference to "group or class actions" from the 1999 and 2000 versions of the rules.

The rules further provide that a panel of three "adjudicators" resolves arbitration claims and are chosen from three separate selection pools: (1) supervisors or managers of an employer signatory to an agreement with EDSI; (2) employees who are non-exempt from the wage and hour protections of the Fair Labor Standards Act; and (3) attorneys, retired judges, or other competent legal professional persons not associated with either party. No individual who has been employed by an employer involved in the dispute can serve as an adjudicator.

EDSI provides the parties with a list of three potential adjudicators in each of the three selection pools. The parties have access to a schedule of the adjudicators' fees and their employment history for at least the previous five years, along with related biographical information. Potential adjudicators also are required to disclose any information which may preclude them from making an objective and impartial decision.

Once EDSI selects the pools of potential adjudicators, the claimant and the defendant alternately strike names from each of the three selection pools until one name from each pool remains. Any potential adjudicator may be struck for cause. As a matter of EDSI practice, if an adjudicator is removed from the pool for cause, EDSI provides another potential adjudicator.

Once arbitration proceedings commence,[4] any party may serve a request for production of documents, and counsel for

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[4] The arbitration takes place in the city or county in which the employee was employed, unless the employee requests a different location.

the parties have subpoena power. The rules also permit each party to schedule a deposition of one individual. A party may file a request for additional depositions, "but such requests are not encouraged and shall be granted in extraordinary fact situations and for good cause shown."

Under the 2000 version of the rules, EDSI reserves the right to modify or amend the Rules after the date the claimant signs the Arbitration Agreement. The claimant, however, has the right to have his or her dispute resolved pursuant to the rules that were in effect at the time the agreement was signed, unless he or she prefers the modified rules.

II.

Plaintiffs filed a self-styled class action under the FLSA, seeking unpaid wages and related penalties against Ryan's. Ryan's argues that Plaintiffs' action should not be in federal court at all and, pursuant to the FAA, moved to enforce the pre-employment arbitration agreements that Plaintiffs executed. For the reasons that follow, we hold that the district correctly refused to enforce Plaintiffs' arbitration agreements as unenforceable under Tennessee law.

A. Standard of Review

This Court reviews *de novo* a district court's decisions regarding both the existence of a valid arbitration agreement and the arbitrability of a particular dispute. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 311 (6th Cir. 2000) (citations omitted).

B. Analysis

1. The FAA and State Law

"The FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, [9 U.S.C.] § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, [*id.*] § 4." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). "The FAA expresses a strong public policy favoring arbitration of a wide class of disputes." *Cooper v. MRM Investment Co.*, 367 F.3d 493, 498 (6th Cir. 2004). The Sixth Circuit has repeatedly applied the FAA to arbitration agreements formed in the employment setting. *E.g.*, *Cooper*, *supra*; *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004 (*per curiam*); *Floss*, *supra*. In particular, statutory claims may be the subject of an arbitration agreement, including employment discrimination claims and claims under the FLSA. *Gilmer*, 500 U.S. at 26-35 (holding that there had been no showing that Congress intended to preclude the arbitration of claims under the Age Discrimination in Employment Act); *Floss*, 211 F.3d at 313 (holding that FLSA claims may be arbitrable).

The FAA provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" 9 U.S.C. § 2. "Thus, generally applicable state-law contract defenses like fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability, may invalidate arbitration agreements." *Cooper*, 367 F.3d at 498 (citations omitted). "The federal policy favoring arbitration, however,

is taken into consideration even in applying ordinary state law." *Id.* (internal quotation marks and citations omitted).

2. Choice of Law

Tennessee law applies when analyzing the enforceability of the three named Plaintiffs' Arbitration Agreements because the agreements were executed in Tennessee and substantially performed in that state. *See Cooper*, 367 F.3d at 499 (holding that the district court correctly looked to Tennessee law to determine whether arbitration agreement was enforceable because the agreement was executed there, the plaintiff's employment and the alleged wrongful conduct occurred there, and neither party expected any other state's law to apply); *Floss*, 211 F.3d at 314 ("In deciding whether the agreements are enforceable, we examine applicable state-law contract principles.") (citations omitted). Ryan's argues, however, that the laws of other states apply to the plaintiffs who have opted-in to this litigation and who worked at Ryan's locations outside of Tennessee. Ryan's further argues that the district court violated its due process rights by applying only Tennessee law to address its motion to compel arbitration with respect to these opt-in plaintiffs. We disagree.

The Supreme Court has held that application of only one state's law in the context of a class action may violate the due process clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1 of the Constitution. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985) (holding that, for Kansas law to apply to class action by gas company investors seeking to recover interest on royalties, Kansas must have a significant contact or significant aggregation of contacts to the claims asserted by each member of the Plaintiff class, in order to ensure that the choice of Kansas law is not arbitrary or unfair). No constitutional problem exists in this case,

however, if Tennessee law does not "conflict[] in any material way with any other law which could apply. There can be no injury in applying [Tennessee] law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816.

Ryan's has failed to demonstrate how Tennessee contract law materially conflicts with that of any other jurisdiction in which some of the opt-in plaintiffs worked. Ryan's has failed to show that the law of any other jurisdiction does not, like Tennessee, require consideration or mutuality for a valid contract or refuses to enforce unconscionable contracts. Instead, Ryan's cites to federal and state court decisions from other states which have enforced Ryan's Arbitration Agreement in other factual settings. These decisions, however, do not establish a material conflict in basic contract principles among the states. Indeed, judges within a state often reach different results in cases when applying identical state laws. *Compare Tenaglia v. Ryan's Family Steak Houses, Inc.*, 2003 U.S. Dist. LEXIS 26322, *24-26, No. 4:02-2684-25BH (D.S.C. May 9, 2003) (copy in Addendum to Ryan's Brief) (applying South Carolina law; compelling arbitration after rejecting arguments that contract should be voided as an unconscionable contract of adhesion or due to lack of mutuality and consideration, duress, fraud in the inducement, or because the Plaintiff did not knowingly and voluntarily consent to arbitration) *with Brown v. Ryan's Family Steak Houses, Inc.*, 2004 U.S. Dist. LEXIS 27456, No. 2:03-2582, slip op. at 10-11 (D.S.C. Feb. 27, 2004) (copy in Addendum to Plaintiffs' Brief) (applying South Carolina law; refusing to compel arbitration because the plaintiff lacked the capacity to consent to arbitration and because the plaintiff did not knowingly and voluntarily consent to arbitration). Because Ryan's has failed to demonstrate any relevant contradiction between Tennessee law and the law of another state, we reject

Ryan's asserted constitutional prejudice stemming from the district court's reliance on Tennessee law to determine the enforceability of any of Plaintiffs' Arbitration Agreements.

3. Consideration

In *Floss*, *supra*, this Court addressed the propriety of virtually the identical arbitral scheme at issue in this case and, as in this case, applied Tennessee contract law. At issue was the arbitrability of Plaintiffs Sharon Floss's and Kyle Daniels's FLSA claims in light of the arbitration agreement that they had executed with EDSI as part of their application for employment with Ryan's. As in this case, the plaintiffs argued that the EDSI rules and procedures did not allow them to effectively vindicate their FLSA claims on the grounds that the procedures allow for the appointment of a biased panel of arbitrators and unduly limited their discovery opportunities. *Floss*, 211 F.3d at 313-14.

After voicing its concerns over EDSI's arbitrator selection process, the *Floss* Court held that the plaintiffs were not bound by their arbitration agreements because, as a matter of Tennessee law, EDSI had not provided adequate consideration for the plaintiffs' promise to submit any dispute that they may have with Ryan's to arbitration with EDSI. *Floss*, 211 F.3d at 314-16. According to the EDSI rules then in effect, EDSI had reserved the right to alter the applicable rules and procedures without any obligation to notify or receive the consent of the plaintiffs. *Id.* at 315-16. The Court held that EDSI's right to choose the nature of its performance rendered its promise "fatally indefinite" and, therefore, lacking in consideration.*Id.* at 316.

In response to the holding in *Floss*, EDSI amended its rules and the Arbitration Agreement in 2000. As under prior

versions, the 2000 rules give EDSI the right to modify or amend the rules after the date the claimant signs the Arbitration Agreement. The rules, however, include the following additional language: "In the event these Rules and Procedures are modified after a Claimant has signed an Agreement, the claimant shall have the option to have his or her claim adjudicated under the Rules and Procedures that were in effect on the date the Agreement was signed or the Rules and Procedures that are in effect on the date their claim is filed with EDSI."

EDSI amended the Arbitration Agreement to be consistent with the revised rules. The Arbitration Agreement used to provide that any employment-related dispute would be brought only in EDSI's arbitration forum and under its rules and Procedures, "as modified from time to time." The new agreement omits the "as modified from time to time" language and adds the following: "However, should the EDSI Rules and Procedures be amended, I shall have the right to choose to have my employment-related dispute resolved under the Rules and Procedures that are in effect on the date I sign this Agreement or the Rules and Procedures in effect on the date I file a claim with EDSI."

Ryan's maintains that these linguistic changes to the rules and the agreement cure the consideration problem that the *Floss* court identified; they argue that EDSI's promise is not illusory because Plaintiffs can insist on the rules in effect at the time they entered into their Arbitration Agreements. Plaintiffs disagree, arguing that EDSI still maintains the right to modify or amend the rules without notice or consent.

We hold that Plaintiffs have the better argument because they signed the identical Arbitration Agreement at issue in *Floss*. Their agreements explicitly reserve EDSI the right to

modify or amend the rules from time to time, without providing Plaintiffs the right to insist on the rules in effect at the time that they executed their respective agreements. Although the 2000 version of the rules purport to afford Plaintiffs the right to enforce the rules in effect at the time of execution, Plaintiffs' agreements do not incorporate that right. Each of their agreements states that "My Agreement ... contains the entire understanding and agreement of the parties regarding these subjects" and that "My Agreement may not be altered or amended, except in writing signed by the President of EDSI and Me."[5] There is no evidence in the record that any of Plaintiffs agreed in writing with the EDSI's President to adopt the 2000 version of the rules or that Plaintiffs provided any new consideration for EDSI's new promise to disregard (upon Plaintiffs' request) any post-execution amendments to its rules. Accordingly, as far as the named Plaintiffs are concerned, EDSI still retains the unfettered contractual right to alter or amend the rules and procedures, including the right to eliminate the rule added in 2000 that purports to give the claimant the right to enforce the rules and procedures that existed at the time that he or she executed the agreement. Therefore, Plaintiffs' Arbitration Agreements are no different from the agreements at issue, and held to be unenforceable, in *Floss* due to inadequate consideration from EDSI.[6]

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[5] Plaintiff Atchley's agreement, executed in 1994, refers to "EDR" (Employment Dispute Resolution, Inc.), the former name of EDSI.

[6] *But see Gardner v. Ryan's*, No. 1:01CV00030, 2001 WL 1352113, at *3 (W.D. Va. Oct. 13, 2001) (holding that EDSI's modification of rules to give the claimant the right to choose which set of rules that he or she prefers cured the consideration problem evident in the prior version of the rules).

Arguably, the consideration for Plaintiffs' promises to arbitrate derives from a source other than EDSI, such as a promise by Ryan's, which claims to be a third-party beneficiary of the contracts between EDSI and Plaintiffs. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(4) ("The performance or return promise [as consideration for a promise] may be given to the promisor or to some other person. It may be given by the promisee or by some other person."). We hold, however, that Ryan's has not provided adequate consideration.

Adequate consideration cannot take the form of Ryan's promise to submit any claims it may have against Plaintiffs to EDSI's arbitral forum. As explained by one district court:

> EDSI is bound by its promise to Plaintiffs only to the extent that Ryan's is bound to submit to the forum, for without Ryan's consent EDSI can provide no benefit to Plaintiffs. EDSI/Ryan's Contract contains an escape clause whereby Ryan's can cancel its Contract with EDSI on ten days notice. ... This provision stands in clear contrast to the mutual termination clause found in the Arbitration Agreement, thus negating any consideration that Plaintiffs might be deemed to receive from EDSI's promise to provide the forum. Similarly, the ten-day escape clause eliminates consideration that might otherwise exist or flow from Plaintiffs' "third-party beneficiary" status, as alluded to in the Arbitration Agreement.

Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 1001 (S.D. Ind. 2001). Indeed, we question whether the agreement between EDSI and Ryan's even obligates Ryan's to submit to EDSI's arbitral forum at all. The EDSI/Ryan's agreement merely obligates EDSI (for a fee from Ryan's) to

"*administer and provide access to* the EDSI alternative dispute resolution procedures and forum for all Company job applicants, employees, and the Company itself, as provided in the EDSI Rules and Procedures" (J.A. 1758.) (emphasis added). Notably, the agreement does not *require* Ryan's to submit its employment claims to the EDSI forum. Thus, the Arbitration Agreements that Plaintiffs executed misrepresent the meaning of the EDSI/Ryan's agreement by stating that Ryan's "has entered into an agreement with [EDSI] to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company." In truth, it is only the Ryan's applicant or employee who has agreed to bring any employment-related dispute exclusively in the EDSI arbitration forum. *See, e.g.*, J.A. 108 (Arbitration Agreement, § B.1) ("Any employment-related dispute ... will be brought ONLY in the EDSI arbitration forum ....") (emphasis in original). Although the EDSI/Ryan's contract refers to EDSI's rules, and those rules govern any employment claim Ryan's may have against an applicant or employee, *see* J.A. 310 (EDSI/Ryan's Contract, Article II, § 1(a), (b)), the rules do not require Ryan's to submit to the EDSI forum to resolve its employment disputes. Even if the rules did so provide, Ryan's promise to submit to that forum would be "fatally indefinite" because (a) Plaintiffs' Arbitration Agreements reserve EDSI's right to modify those rules and (b) Ryan's exerts significant financial control over EDSI[7] and, hence, the rules that supposedly bind *Ryan's Floss*, 211 F.3d at 316.

Without any supporting Tennessee authority, Ryan's argues that the fact that it would not consider Plaintiffs' employment applications without their prior agreement to

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[7] See Section III.B., *infra*.

arbitrate constitutes sufficient consideration for Plaintiffs' promises to arbitrate. One district court has rejected this argument under Indiana law, holding that "merely a promise to consider an applicant's application, not employ her, ...standing alone, will not bear the weight required to allow us to construe the Arbitration Agreement as a binding contract." *Geiger*, 134 F. Supp. 2d at 1001-02; *see also Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 760-61 (7th Cir. 2001) (holding that there was no consideration for the plaintiff's arbitration agreement with EDSI; noting that "the defendants provide no evidence that any Indiana court has ever held that a mere promise to consider an application for employment would provide consideration for a separate contract"). We similarly conclude that Ryan's has failed to demonstrate that, under Tennessee law, an employer's promise to consider an employment application is adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process. Moreover, the record in this case suggests that Ryan's has considered applications and hired applicants without first requiring them to execute an arbitration agreement. Nanella Dukes, Julie Oakes, and Steven Ricketts all were interviewed and hired without first completing their Arbitration Agreements, suggesting that Ryan's promise to consider only applicants who have agreed to arbitrate is illusory, and therefore inadequate, consideration for a promise to arbitrate any kind of employment-related dispute.

4. Knowing and Voluntary Waiver of Right to File Suit in Federal Court

Citing this Court's holding in *KMC Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), the district court held that Plaintiffs could not be compelled to arbitrate their claims because they did not knowingly and voluntarily waive their

constitutional right to a jury trial. *See KMC*, 757 F.2d at 755-56 (holding that the parties to a contract may by prior written agreement waive the right to jury trial as long as the waiver is knowing and voluntary). A panel's recent decision in *Cooper* characterized *KMC's* adoption of the knowing and voluntary standard as dictum, but nevertheless applied the standard. *See Cooper*, 367 F.3d at 507 (holding that "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial"). We need not struggle with the question of whether *KMC* is binding precedent on this issue, because the *en banc* Court in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (*en banc*) clearly adopted the knowing and voluntary standard for agreements to arbitrate in lieu of litigation.

According to *Morrison*, to evaluate whether a plaintiff has knowingly and voluntarily waived his or her right to pursue employment claims in federal court, the following factors must be evaluated: (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances. *Id.* (quoting *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995)). The district court correctly held that these factors demonstrate that Plaintiffs did not knowingly and voluntarily consent to arbitration.

First, most of the plaintiff class have not completed high school, and most were in dire financial circumstances at the time of application. The average annual salary for a top-paid Ryan's restaurant worker is approximately $16,000, while minimum wage employees make approximately $11,000

annually. Accordingly, the district court did not err in concluding that the experience, background, and level of education of the plaintiffs was "low to mid-level."

Second, Plaintiffs typically were hired on the spot after a brief interview, during which the hiring manager hurriedly presented them with various documents that they were instructed to sign in order to be considered for a job. According to one opt-in plaintiff, Ryan's managers would place an "x" in every spot an applicant is required to sign, and applicants would be told to sign every "x" without any explanation. The hiring manager usually would not mention the arbitration agreement, and Plaintiffs had no opportunity to take the Arbitration Agreement home or consult an attorney, even though the agreement purports to afford them that right. Unlike the arbitration agreement found to be knowingly and voluntarily executed in *Morrison* because the plaintiff had three days to withdraw her consent, *Morrison*, 317 F.3d at 668, Plaintiffs were given no option to revoke their consent to the Arbitration Agreement.

Additional evidence suggests that, on those occasions when Ryan's managers would discuss the agreement, they would provide misleading information. Plaintiff Julie Oaks's manager explained that the arbitration agreement meant that if Oaks ever had any problems with Ryan's, she "had to 'go through Ryan's' before [she] could go to an attorney." Paul Heuther, a former manager at various Ryan's restaurants, explained that "supervisors at Ryan's told us during manager meetings with them, that if it came up to tell any job applicant that the arbitration agreement meant that problems would be handled 'up the chain of command,' and that we would handle problems 'in house' first, and if the problem could not be resolved there, then it would be taken to the supervisor to resolve." It is no surprise, therefore, that many of the

plaintiffs do not even recall executing agreements that preclude them from vindicating their rights in state or federal court.

Third, the Arbitration Agreement's waiver provision states that the claimant agrees that any disputes with Ryan's "which would otherwise be decided in court, shall be resolved only through arbitration in the EDSI forum and NOT THROUGH LITIGATION IN STATE OR FEDERAL COURT." (J.A. 303)(emphasis in original). The district court found that the waiver provision is explicit, but not clear because it does not use more commonly understood waiver language about forgoing the right to have claims heard at "trial" or by a "jury." *Cf. Buraczynski v. Eyring*, 919 S.W.2d 314, 322 (Tenn. 1996) (affirming motion to compel arbitration of agreement that stated, "BY SIGNING THIS CONTRACT ... YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL") (emphasis in original). We are not entirely persuaded by the district court's reasoning because the Arbitration Agreement does refer to the fact that the signatory agrees to arbitrate claims "which would otherwise be decided in court," conveying the key point that the signatory will not be able to bring a claim in court. And, although the waiver provision does not refer to relinquishing the right to a jury trial, this Court has held that "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial." *Cooper*, 367 F.3d at 508 (citation omitted). Nevertheless, the district court's conclusion is supported by the fact that most of the plaintiffs lack even a high school degree and, therefore, were at a disadvantage when attempting to comprehend the Arbitration Agreement's legalistic terminology. The court's conclusion is further supported by the fact that Ryan's managers appeared to have provided misleading information to several of the plaintiffs

about what rights they would relinquish upon executing the Arbitration Agreement, providing them with a confused interpretation of the waiver language.

Fourth, for the reasons discussed above, the court correctly held that the agreements lacked consideration.

Like the district court, we hold that an analysis of the above-stated factors support the conclusion that Plaintiffs did not knowingly and voluntarily execute their Arbitration Agreements. Accordingly, the district court did not err in refusing to enforce them on this ground.

5. Mutual Assent

The district court found that there was strong evidence that the Arbitration Agreements between Plaintiffs and EDSI did not result from a meeting of the minds in mutual assent. We agree.

It is well-settled under Tennessee law that a contract must result from a meeting of the minds of the parties in mutual assent to the terms.*Higgins v. Oil, Chemical & Atomic Workers Int'l Union, Local # 3-677*, 811 S.W.2d 875, 879 (Tenn. 1991). Although the question of mutual assent involves largely an objective analysis, the parties' intent remains relevant, in particular the circumstances surrounding the formation of the contract. *Id.* at 879. The district court below held that Plaintiffs did not mutually assent with EDSI to the terms of their Arbitration Agreements because there is a question as to whether Plaintiffs were provided with the rules when they signed the contracts, conflicting evidence about whether Plaintiffs knew what they were signing at the time they executed the agreements, and evidence that Ryan's managers provided misleading information about the agreements and the arbitration process prior to execution. The

court concluded that these facts overcome the general presumption under Tennessee law that a party is under a duty to learn the contents of a written contract before signing and, therefore, may not deny that a contract he or she admittedly has signed and that expresses the agreement that he or she made. *See Giles v. Allstate Ins. Co.*, 871 S.W.2d 154, 156-57 (Tenn. Ct. App. 1993).

As legal support, the district court relied on *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003), where the Tennessee Court of Appeals held that the plaintiff was not bound by an arbitration agreement that a nursing home employee presented to him upon admitting his wife to a nursing home. According to the plaintiff, the employee "pushed" the documents in front of him and asked him to sign without explanation. *Id.* at 732. The plaintiff's daughter, who had accompanied the plaintiff, testified that she did not recall the nursing home employee even using the word "arbitration." *Id.* The nursing home employee testified that she paraphrased the arbitration agreement for the plaintiff. *Id.*

The court affirmed the denial of the motion to compel arbitration, holding that the defendant failed to meet its burden of showing that the parties actually bargained over the arbitration provision or that it was within the reasonable expectation of the ordinary person under the circumstances. *Id.* at 734-35. The court relied on the following facts to reach this conclusion: (1) the admission agreement was eleven pages long, but the arbitration provision was in the middle of page ten and did not adequately explain how the arbitration procedure would work; (2) the agreement was presented to the plaintiff on a "take-it-or-leave-it" basis while he was attempting to admit his wife to the nursing home; (3) the plaintiff had no real bargaining power; (4) the plaintiff's

educational limitations were obvious; and (5) the agreement was not adequately explained regarding the jury trial waiver. *Id.* at 734-35. Significantly, the court noted that the fact that the plaintiff could not read would not excuse him from a contract; however, because the nursing home employee took it upon herself to explain the contract, rather than asking the plaintiff to read it, she had an obligation to explain that he was waiving a right to a jury trial if a claim was brought against the nursing home, but she failed to do so. *Id.* at 735.

Although the facts of the *Howell* case arguably are more sympathetic than the facts in the instant case, we hold that Ryan's failed to meet its burden of showing Plaintiffs and EDSI actually bargained over the Arbitration Agreement or that it was within the reasonable expectation of the ordinary person considering the circumstances. As discussed in greater detail in the preceding discussion (whether Plaintiffs' waiver of their jury trial rights was knowing and voluntary), Plaintiffs were presented with the Arbitration Agreement in a hurried fashion and told to simply sign if they wanted to be considered for employment. The agreements were presented to Plaintiffs on a "take it or leave it" basis, and Plaintiffs had no real bargaining power; they had to sign the agreements if they wanted to be considered for employment. Although the Arbitration Agreements state that Plaintiffs had the right to consult an attorney, in reality, they had no opportunity to exercise that right because they had to sign the agreements on the spot. Plaintiffs educational limitations (many have not completed high school and were seeking jobs that would provide them poverty-level wages) also were obvious. Finally, on those occasions when Ryan's managers took it upon themselves to explain the Arbitration Agreement, they gave inaccurate information about the arbitration process and did not tell them that they were waiving their right to a jury trial. For these reasons, the district court correctly held that

Plaintiffs did not mutually assent to arbitrate their employment disputes when they executed their agreements with EDSI.

6. Unconscionable Adhesion Contracts

The district court held that Plaintiffs' Arbitration Agreements were unenforceable adhesion contracts. Under Tennessee law, an adhesion contract is "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Buraczynski*, 919 S.W.2d at 320 (quoting Black's Law Dictionary 40 (6th ed. 1990)). Here, Ryan's presented Plaintiffs with a standardized Arbitration Agreement at or around the time of applying for employment. Ryan's presented the agreements on a "take it or leave it" basis, because Plaintiffs had no opportunity to bargain over the agreements' terms and ostensibly would not be permitted to apply for employment without first agreeing to arbitrate.

We have some concerns about whether Plaintiffs demonstrated the final element of an adhesion contract: "the absence of a meaningful choice for the party occupying the weaker bargaining position." *Cooper*, *supra*, 367 F.3d at 501-02. To find their Arbitration Agreements adhesive, the district court was required to cite "evidence that [Plaintiffs] would be unable to find suitable employment if [they] refused to sign [EDSI's] agreement." *Id.* at 502. The court cited no such evidence. *Cf. id.* at 502-03 (reversing district court's finding that pre-employment arbitration agreement was an adhesion contract under Tennessee law because the record was silent on whether other local employers might have hired the Plaintiff

without a similar agreement). Nevertheless, we note that the lack of such evidence may not be relevant to the agreements signed by Plaintiffs like Nanella Dukes, Julie Oakes, and Steven Ricketts, who were interviewed and hired without first executing their Arbitration Agreements. Arguably, because they already had been hired and were working when Ryan's presented them with the agreements, Ryan's may have terminated them had they refused to sign. Ryan's therefore had significantly more bargaining power over these Plaintiff-employees, who, unlike applicants, likely had forgone other employment opportunities and would have been severely disadvantaged by having to inform prospective employers that they were terminated shortly after their hire. In contrast to telling an applicant that he or she needs to sign the agreement or else do not bother applying, the threat of termination from one's current employment would appear to be sufficient in itself to demonstrate "the absence of a meaningful choice for the party occupying the weaker bargaining position." *Id.* at 501-02. We need not remand to the district court to reexamine this issue, however, because the court correctly held that the Arbitration Agreements are unenforceable on other state law grounds. Accordingly, we affirm the court's denial of Ryan's motion to compel arbitration of Plaintiffs' claims.

III.

In addition to refusing to enforce Plaintiffs' arbitration agreements on state law grounds, the district court held that the agreements are unenforceable because they do not allow Plaintiffs to effectively vindicate their rights under the FLSA. We agree for the reasons discussed below. A. Standard of Review

This Court reviews *de novo* a district court's decisions regarding the arbitrability of a particular dispute. *Floss*, 211 F.3d at 311.

B. Analysis

Even if there is no contract-based defense to the enforceability of an arbitration agreement, a court cannot enforce the agreement as to a claim if the specific arbitral forum provided under the agreement does not "allow for the effective vindication of that claim." *Floss*, 211 F.3d at 313. Generally, a party cannot avoid the arbitration process simply by alleging that the arbitration panel will be biased, because the FAA "protects against bias, by providing that courts may overturn arbitration decisions 'where there was evident partiality or corruption in the arbitrators.'" *Gilmer*, 500 U.S. at 30 (quoting 9 U.S.C. § 10(b)); *see also id.* (declining "'to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators'") (quoting*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)). However, the general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair. *McMullen*, 355 F.3d at 494 n.7. In such a case, "the arbitral forum is not an effective substitute for a judicial forum," and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial review. *Id.*

The Arbitration Agreements and related rules and procedures at issue in this case demonstrate that EDSI's arbitral forum is not neutral and, therefore, the agreements are unenforceable. As previously described, under EDSI's

rules, three "adjudicators" are selected from three separate selection pools to preside over the arbitration hearing. The first of these pools consists of supervisors and managers from another EDSI signatory company; the second consists of employees from another signatory; and the third contains attorneys, retired judges, and other "competent legal professional persons not associated with either party." Although dictum, language in *Floss* signaled this Court's extreme disapproval of this arbitrator selection mechanism:

> We have serious reservations as to whether the arbitral forum provided under the current version of the EDSI Rules and Procedures is suitable for the resolution of statutory claims. Specifically, the neutrality of the forum is far from clear in light of the uncertain relationship between Ryan's and EDSI. [Plaintiffs] Floss and Daniels suggest that EDSI is biased in favor of Ryan's and other employers because it has a financial interest in maintaining its arbitration service contracts with employers. Though the record does not clearly reflect whether EDSI, in contrast to the American Arbitration Association, operates on a for-profit basis, the potential for bias exists. In light of EDSI's role in determining the pool of potential arbitrators, any such bias would render the arbitral forum fundamentally unfair. *See Cole v. Burns Int'l Security Services*, 323 U.S. App. D.C. 133, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.").

Id. at 314; *see also McMullen*, *supra*, 355 F.3d at 493-94 (following dictum in *Floss* to strike down arbitration scheme

in which employer had exclusive control over selection of arbitrator pool).

The record in this case removes any of the uncertainties surrounding the relationship between Ryan's and EDSI that the Court noted in *Floss*. EDSI is clearly a for-profit business, and Ryan's annual fee accounted for over 42% of EDSI's gross income in 2002. Given the symbiotic relationship between Ryan's and EDSI, Ryan's effectively determines the three pools of arbitrators, thereby rendering the arbitral forum fundamentally unfair to claimants who are applicants or employees. *See Geiger*, 134 F. Supp. 2d at 995 (holding that there is a strong potential for bias in the selection of the arbitration panel because EDSI receives payment from its agreements with various employers to provide a forum for resolving employment disputes, but no comparable payment is made by or received from an employee for agreeing to submit to the forum; further holding that EDSI's full authority to select both the Rules for arbitration as well as the pools of potential arbitrators, combined with EDSI's potential bias in favor of employers like Ryan's, rendered it "unlikely that applicants/employees will participate in an unbiased forum"); *McMullen*, 355 F.3d at 493-94 (holding that the employer's exclusive control over the pool of potential arbitrators prevented the plaintiff from effectively vindicating her Title VII rights: "The arbitrator-selection procedure used by Meijer allows it to create the type of symbiotic relationship with its arbitrators that we feared would promulgate bias in *Floss*."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (affirming denial of motion to compel because the arbitration rules provided a mechanism for selecting a panel of three arbitrators that was crafted to ensure a biased decisionmaker; the employer created the list of potential arbitrators).

The bias against employees and applicants is significantly enhanced by the lack of any criteria governing employees of signatory companies who are eligible to serve as adjudicators. There are no minimum educational requirements, potential arbitrators do not need to have any relevant experience as an adjudicator, and there is no explicit requirement that they be unbiased. Similarly, the rules do not require that the legal professionals who comprise the third pool possess either substantive or procedural knowledge of dispute resolution or of the employment law issues involved in the arbitration. The names of potential arbitrators for the legal professional pool purportedly are provided to EDSI by an unaffiliated company, Resolute Systems, Inc.; however, there is no information in the record regarding how Resolute Systems selects potential adjudicators for EDSI's program.

The bias is exacerbated by the lack of a protocol governing EDSI's selection of potential adjudicators from the three pools. The individuals in the supervisor and employee pools are neither randomly selected nor chosen by a disinterested person for their skills. Instead, all members of these two pools are chosen by the small number of employers who, like Ryan's, have signed alternative dispute resolution agreements with EDSI: Golden Corral Steak Houses, K&W Cafeterias, Papa John's Pizza, Sticky Fingers Restaurants, The Cliffs at Glass, Inc., and Wieland Investments, Inc. In addition, the rules do not prevent a supervisor of a signatory company from sitting on an adjudication panel with a non-supervisory employee from the same company, including someone whom the supervisor directly supervises. Further, EDSI has no policy in place that prohibits a signatory company from discussing the arbitration process or specific claims with its employee adjudicators or from attempting to improperly influence its employee adjudicators.

Finally, the limited discovery that the EDSI forum provides could significantly prejudice employees or applicants. The rules allow "just one deposition as of right and additional depositions only at the discretion of the (arguably biased) panel, with the express policy that depositions 'are not encouraged and shall be granted in extraordinary fact situations only for good cause shown.'" *Geiger*, 134 F. Supp. 2d at 996 (quoting EDSI Rules, Art. XII, § 6; reproduced at J.A. 315.). We agree with the district court's conclusion in *Geiger* that "the limited discovery, controlled by a potentially biased arbitration panel, ... creates the unfairness to claimants." *Id.*[8] We acknowledge that the opportunity to undertake extensive discovery is not necessarily appropriate in an arbitral forum, the purpose of which is to reduce the costs of dispute resolution. Indeed, when parties enter arbitration agreements at arms-length they typically should expect that the extent of discovery will be more circumscribed than in a judicial setting. But parties to a valid arbitration agreement also expect that neutral arbitrators will preside over their disputes regarding both the resolution on the merits and the critical steps, including discovery, that precede the arbitration award. A structural bias in the make-

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[8] Plaintiffs also complain that the current EDSI rules omit any reference to class actions, and the district court refused to compel arbitration because the rules appear to prohibit the arbitration of class actions. It does not appear, however, that arbitration procedures are required to provide for class actions. *See Gilmer*, 500 U.S. at 32 (rejecting argument that arbitration procedures were inconsistent with the purposes of the ADEA because they did not provide for class actions); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (holding that there is "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute").

up of the arbitration panel, which would stymie a party's attempt to marshal the evidence to prove or defend a claim, can be just as prejudicial as arbitral bias in the final decision on the merits. Such is the case here, providing an additional basis to conclude that EDSI's and Ryan's arbitration scheme does not allow for the effective vindication of Plaintiffs' FLSA claims.

IV.

For all the foregoing reasons, we **AFFIRM** the district court's holdings that state law contract defenses preclude enforcement of Plaintiffs' arbitration agreements and that Plaintiffs' arbitration agreements are unenforceable under the FAA because they do not allow for effective vindication of their FLSA claims.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Case No. 3:02-1078

[October 2, 2003,]

ERRIC WALKER, STEVE RICKETTS, and VICKIE ATCHLEY, on behalf of themselves and all others similarly situated, Plaintiffs,	)
v.	)
RYAN'S FAMILY STEAK HOUSES, INC., Defendant.	)

OPINION

Aleta A. Trauger, Judge. Pending before the court is defendant Ryan's Family Steak Houses, Inc.'s Motion to Dismiss and Petition to Compel Arbitration and Stay Proceedings (Docket No. 7), to which plaintiffs have responded (Docket No. 80; Docket No. 99) (contemporaneously filing, in the response documents, a Motion for Recission of EDSI Arbitration Agreements and a

Renewed Motion for Expedited Court-Supervised Notice and Order Compelling Defendant to Expeditiously Disclose the Identities of Similarly Situated Employees), and defendant has replied (Docket No. 100).

Factual Background

Defendant Ryan's Family Steak Houses, Inc. ("Ryan's") is a Delaware corporation, with its principal place of business in South Carolina, that owns and operates a chain of over 300 restaurants in twenty-two states. (Docket No. 8, Affidavit of Randy Hart P 4.) Plaintiffs are current and former employees of Ryan's who have brought this collective action to remedy alleged widespread and pervasive violations of the wage provisions of the Fair Labor Standards Act ("FLSA") by Ryan's, who they contend has deprived the named plaintiffs, and other similarly situated individuals, of their lawful wages.[1] (Docket No. 1, Collective Action Complaint for Violations of the Fair Labor Standards Act of 1938 P 1.) For

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[1] The original named plaintiffs are Erric Walker, Steve Ricketts, and Vickie Atchley. Plaintiffs filed contemporaneous with their complaint a Notice of Filing of Consents to Become Party Plaintiff for the three representative plaintiffs (Docket No. 4, Ex. 1), and for ten additional plaintiffs--Kay Cole, Nanella Dukes, Karen P. Holt, Virginia Jordan, Kaprece Keaton, Jennifer Kurtz, Adelaide Midkiff, Julie M. Oaks, Benjamin A. Sinclair, and April Williamson (Docket No. 4, Ex. 2). Eight additional plaintiffs were added later: Jeffrey W. Comley, Sharon Henry, Sharon Pinckney, Angie G. Lee (Docket No. 12, Notice of Consents to Become Party Plaintiffs, Ex. 1), Alicia T. McGill (Docket No. 17, Notice of Filing of Consent to Become Party Plaintiff, Ex. 1.), Deborah D. Bellamy, Paula K. Reuther, and Lanetta R. Kannady (Docket No. 61, Notice of Consents to Become Party Plaintiffs, Ex. 1). There are twenty-one plaintiffs in total.

purposes of this motion, the only relevant facts concern the plaintiffs' execution of an agreement to submit all potential disputes arising from their employment with Ryan's to binding arbitration.

Since 1993, Ryan's has had in place an agreement with Employment Dispute Services, Inc. ("EDSI") (formerly Employment Dispute Resolution) under which EDSI agrees to provide an arbitral forum for all Ryan's job applicants, employees, and the company itself, in exchange for annual payment from Ryan's. (Docket No. 82, Ex. 2, Deposition of James P. LaCoste, Jr. at 24; Docket No. 82, Ex. 18, Agreement to Provide Services.) In turn, Ryan's requires all job applicants, prior to being considered for employment, to sign a document entitled variously "Job Application Agreement to Arbitration of Employment-Related Disputes" or "Job Applicant Agreement to Arbitration of Employment-Related Disputes" ("the Agreement") with EDSI, under which applicants agree to submit any and all employment-related disputes to EDSI's arbitration process and forego their right to have claims heard in a judicial forum. (Docket No. 82, Ex. 4, Applicant Packet; Docket No. 8, Ex. 1, Walker Agreement; Docket No. 8, Ex. 2, Ricketts Agreement; Docket No. 8, Ex. 3, Atchley Agreement.) If an applicant refuses to sign the Agreement, she will not be considered for employment with Ryan's. (Docket No. 82, Exh. 6, Deposition of James Randolph Hart at 23; Docket No. 82, Ex. 3, Deposition of Judy Kramer at 53-54.) Ryan's is named in the Agreement as a third party beneficiary. (Docket No. 82, Ex. 4, Agreement P B.2.D.)

EDSI is a small corporation, consisting of two directors/owners, James P. LaCoste, Jr. and Robert Berman, and one administrator, Judy Kramer. (Docket No. 82, Ex. 2, LaCoste Dep. at 21.) The company was formed in 1992,

largely in response to the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), with the aim of providing a third-party arbitration service, the Employment Dispute Resolution Program, for the fair and expeditious resolution of employment-related disputes, modeled after the program used in the securities industry. (Docket No. 82, Ex. 2, LaCoste Dep. at 10; Docket No. 10, Affidavit of James P. LaCoste, Jr. PP 3, 4.) Providing and administering an arbitral forum for employers and employees is EDSI's sole business, and EDSI currently has contracts with employers and employees in numerous states to provide arbitration pursuant to this program. (Docket No. 10, LaCoste Aff. PP 10, 11.) EDSI has approximately twelve employer-signatories (or clients) at present; a large number of them are companies in the restaurant industry. (Docket No. 82, Ex. 3, Kramer Dep. at 82, 85.) Each employer-signatory pays an annual fee in order to subscribe to the service, calculated according to the number of employees they have. *Id.* at 88. In calendar year 2002, EDSI grossed approximately $ 100,000. (Docket No. 82, Ex. 2, LaCoste Dep. at 104.) Ryan's pays EDSI a $42,500 annual fee. (Docket No. 82, Ex. 3, Kramer Dep. at 92; Docket No. 82, Ex. 8, EDSI Transactions by Account.)

If EDSI is contacted by an employee or an employer regarding a potential claim, that person is sent a claim form and a copy of the EDSI Rules and Procedures ("the Rules") that will govern the arbitration. (Docket No. 9, Affidavit of Judy Kramer P 4.) In order to file a claim, claimants are required to pay a filing fee and to submit that claim to the EDSI forum. (Docket No. 82, Ex. 1, 2000 Rules at 3; Docket No. 82, Ex. 3, Kramer Dep. at 56.) According to Judy Kramer, who has worked for EDSI as the administrator for over five years, no employer has been the initiating party in an arbitration in that time. (Docket No. 82, Ex. 3, Kramer

Dep. at 97.) Under EDSI's Rules[2], the claims are decided by a three-member adjudication panel. (Docket No. 82, Ex. 1, 2000 Rules at 3.) One adjudicator is chosen from each of three separate pools--a group of supervisors or managers of an employer-signatory, a group of non-exempt employees (under the Federal Wage and Hour law) who are signatories to EDSI Agreements, and a group of attorneys, retired judges, or other competent legal professionals not associated with either party. *Id.* at 3-4. In assembling the panel, EDSI provides a list of three potential adjudicators from each of the three pools (none of whom has ever been employed by the employer in the dispute), and the complainant and defendant each strike one name from each pool, until a three-member panel remains. *Id.* at 4. Adjudicators may always be struck for cause. *Id.* at 4.

The experiences of the plaintiffs in this case are all substantially similar to the experiences of the three representative plaintiffs and former Ryan's employees--Vickie Atchley, Steven Ricketts, and Erric Walker. Vickie Atchley was employed as a server at Ryan's Lee Highway store in Chattanooga, Tennessee from approximately May 1994 to June 2002. (Docket No. 83, Declaration of Vickie Atchley P 3.) She has an eighth-grade education and was an unemployed single mother when she applied for the job at Ryan's. *Id.* at P 6. Steven Ricketts also worked at the Ryan's Lee Highway

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[2] This discussion of the EDSI arbitrator selection process is derived from the version of the Rules promulgated in June 2000. The arbitrator selection provisions of the four other versions of the Rules, from the years 1993, 1994, 1998, and 1999, are nearly identical to that provision in the 2000 Rules and are the same in all material respects. (Docket No. 82, Exh. 1, 1993 Rules at 3, 1994 Rules at 3, 1998 Rules at 4-5, 1999 Rules at 2-3, 2000 Rules at 3-4.)

store in Chattanooga, as a server and cook (though he performed other job duties as well) from approximately July 1997 through October 2000. (Docket No. 93, Declaration of Steven Ricketts PP 3, 4.) When Ricketts went to work for Ryan's, he was married with one child, in debt, and his wife was not working. *Id.* at P 7. Erric Walker worked for several different Ryan's over various periods from approximately November 1993 through June 2001. (Docket No. 95, Declaration of Erric Walker P 3.) Walker has a high school education and worked as a floor manager, among other duties. *Id.* at P 10.

The plaintiffs assert that, immediately before or immediately after their hire, they were given application papers to sign while at Ryan's. (Docket No. 83, Atchley Decl. P 5; Docket No. 93, Ricketts Decl. P 5; Docket No. 95, Walker Decl. P 6.) They assert that they were not told about the arbitration agreement. (Docket No. 83, Atchley Decl. P 5; Docket No. 93, Ricketts Decl. P 5; Docket No. 95 Walker Decl. PP 6, 7.) Ricketts and Walker state that they were never given a copy of an arbitration agreement or any rules or procedures, and Atchley states that she was not given any forms to take home and read before signing or to keep for her records. (Docket No. 93, Ricketts Decl. P 5; Docket No. 95, Walker Decl. P 8; Docket No. 83, Atchley Decl. P 5.) None of the three can recall or were aware of signing an arbitration agreement, and Atchley and Walker state that they did not know they had signed an arbitration agreement until after this lawsuit was filed. (Docket No. 93, Ricketts Decl. P 6; Docket No. 83, Atchley Decl. P 5; Docket No. 95, Walker Decl. P 9.) As a floor manager, Walker conducted orientations for new employees at Ryan's but was never trained or asked to mention any arbitration program by his supervisors. (Docket No. 95, Walker Decl. P 10.) He asserts that he told applicants what he had been told by managers

who hired him--that they were required to sign all forms in the packet to be considered for employment. *Id.* The record in this case includes signed arbitration agreements executed by each of these three plaintiffs.[3]

James Randolph Hart, who directs the human resources department at Ryan's, asserts that everyone who applies for a position with Ryan's, including the President and CEO, is required to sign an arbitration agreement as part of the application process. (Docket No. 82, Ex. 6, Hart Dep. at 23, 24.) He asserts that, as of 1996 or 1997, the job application, the Agreement, and the EDSI Rules were all merged into one application package, and job applicants were permitted to retain the copy of the Rules provided with the package whether they were hired or not. *Id.* at 38. He asserts that it is written company policy (part of the manager training program and written on the front of the application package) that applicants are to be able to retain the Rules. *Id.* at 43. Hart also asserts that, prior to 1996 or 1997 and since 1993, Ryan's would offer a laminated copy of the Rules to an applicant as she filled out an application, so that she could review it if she wanted and return it before leaving. *Id.* at 38. Additionally, Hart asserts that applicants who are hired undergo an orientation process, during which they are required to acknowledge, by signature in the Ryan's Team Member Folder provided, that they had previously read and understood the arbitration policy and that a copy of the Rules

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[3] Erric Walker's Agreement was signed on September 22, 2000. (Docket No. 8, Ex. 1, Walker Agreement.) Steven Ricketts's Agreement was signed on June 1, 1998. (Docket No. 8, Ex. 2, Ricketts Agreement.) Vickie Atchley's Agreement was signed on May 26, 1994. (Docket No. 8, Ex. 3, Atchley Agreement.)

was previously provided. (Docket No. 82, Ex. 6, Hart Dep. at 54; Docket No. 82, Ex. 5, Ryan's Team Member Folder.)

Analysis

I. Compelling Arbitration

In deciding whether to compel arbitration of a federal statutory claim, the court must first consider whether the statutory claim is generally subject to compulsory arbitration. If this question is answered in the affirmative, the court considers whether the parties have executed a valid arbitration agreement and, if so, whether the statutory claim is within the scope of the agreement. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 311-12 (6th Cir. 2000) (citing *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)). This court is aware that many state and federal courts have considered the EDSI forum and Agreement and that those courts have both upheld it and found it wanting.[4]

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[4] See Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001) (finding arbitration could be compelled because the dispute was within the scope of the Agreement and the Agreement was not an unconscionable adhesion contract); *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) (striking down the Agreement as unenforceable); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000) (finding the Agreement unenforceable as lacking in consideration); *Mahan v. Ryan's Family Steak Houses, Inc.*, No. 4:02-cv-82 (E.D. Tenn. Jan. 29, 2003) (compelling arbitration with minimal review of validity of the Agreement); *Tenaglia v. Ryan's Family Steak Houses, Inc.*, C.A. No. 4:02-2684-25BH (D.S.C. May 9, 2003) (compelling arbitration on a variety of grounds with substantial analysis); *Gooden v. Ryan's Family Steak House, Inc.*, 2002 U.S.

A. Whether the Statutory Claim Is Generally Subject to Compulsory Arbitration

The court first considers whether the statutory claim is generally subject to compulsory arbitration. The U.S. Supreme Court and the Court of Appeals for the Sixth Circuit recognize a liberal federal policy favoring arbitration

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Dist. LEXIS 8647, No. CIV.A.02-0201, 2002 WL 927783 (E.D. La. May 7, 2002) (compelling arbitration with minimal review of validity of the Agreement); *Palmer v. Ryan's Family Steak Houses TLC, Inc.*, No. 2:02-CV-1589 (W.D. La. Sept. 16, 2002) (compelling arbitration with no inquiry into validity of the Agreement); *Gardner v. Ryan's*, 2001 U.S. Dist. LEXIS 17985, No. 1:01CV00030, 2001 WL 1352113 (W.D. Va. Oct. 31, 2001) (compelling arbitration on finding that EDSI had adequately addressed the illusory promise problem); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001) (refusing to compel arbitration based on bias, unconscionability, lack of consideration, and other factors); *Campbell v. Ryan's Family Steak House, Inc.*, No. 2:99CV052-P-B, 2000 U.S. Dist. LEXIS 2460 (N.D. Miss. Feb. 28, 2000) (upholding the Agreement on minimal review); *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454 (Ala. 1999) (compelling arbitration on minimal review); *Stadtlander v. Ryan's Family Steakhouses, Inc.*, 794 So. 2d 881 (La. Ct. App. 2001) (finding the Agreement viable and controlling over a strong dissent); *Rembert v. Ryan's Family Steak Houses, Inc.*, 235 Mich. App. 118, 596 N.W.2d 208 (Mich. Ct. App. 1999) (remanding to determine whether Agreement was enforceable under its findings); *Scruggs v. Boswell*, No. 01-CVS-691 (N.C. Super. Ct. Nov. 2, 2001) (finding the *Floss* problem had been adequately addressed and compelling arbitration); *Drayton v. Ryan's Family Steak Houses, Inc.*, No. 2000-CP-22-691 (S.C. Ct. Com. Pleas Aug. 7, 2001) (compelling arbitration with minimal review of the Agreement).

agreements. *See Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 652 (6th Cir. 2003) (en banc) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). The Supreme Court has acknowledged that arbitration agreements contained in contracts for employment are enforceable under the Federal Arbitration Act ("FAA"), except as to transportation workers. *Circuit City v. Adams*, 532 U.S. 105, 109, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001). The Sixth Circuit has also held that pre-dispute mandatory arbitration agreements are enforceable. *See Willis v. Dean Wittier Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991) (relying heavily on the Supreme Court's reasoning in *Gilmer*). That a plaintiff's claim is grounded in a statutory right does not necessarily foreclose the arbitrability of the claim. *See Mitsubishi Motors Corp.*, 473 U.S. at 626. The Supreme Court has reasoned that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. While not all claims based on statutory rights are suitable for arbitration, *id.* at 627, the Sixth Circuit has specifically approved compulsory arbitration of FLSA claims. *Floss*, 211 F.3d at 313 (finding FLSA claims to be suitable for arbitration when the specific forum allows for effective vindication of the claims, but refusing to compel arbitration because the arbitration agreement lacked consideration).

The Sixth Circuit has cautioned, however, that the specific arbitral forum must provide for effective vindication of statutory rights before claims implicating those rights can be subject to mandatory arbitration. *Id.* at 313 (citing *Gilmer* for the proposition that specific arbitral fora must allow for effective vindication of statutory claims in order to serve the

remedial and deterrent functions of statutes). *See also McMullen v. Meijer, Inc.*, 337 F.3d 697, 703 (6th Cir. 2003); *Morrison*, 317 F.3d at 658. In determining whether specific arbitral fora have provided for proper vindication of statutory claims, the Sixth Circuit has considered such factors as the neutrality of the forum, evidence of bias, parties' opportunities for discovery, cost-splitting provisions, limitations on remedies, and the arbitrator selection process. *See McMullen*, 337 F.3d at 703-05 (arbitrator selection process); *Morrison*, 317 F.3d at 668-73 (cost-splitting provisions and limitations on remedies); *Floss*, 211 F.3d at 313-14 (neutrality of the forum, evidence of bias, parties' opportunities for discovery, cost-splitting provisions, and arbitrator selection process).

Many of the defendant's main arguments seeking to compel arbitration implicate those factors that the Sixth Circuit has analyzed to determine the suitability of the arbitration forum. The defendant broadly argues that EDSI is a neutral forum for dispute resolution. (Docket No. 11, Memorandum of Law in Support of Ryan's Motion to Dismiss and Petition to Compel Arbitration and Stay Proceedings at 13.) In defense of the EDSI forum's neutrality, the defendant states that there is no connection between EDSI and Ryan's beyond EDSI's contractual promise to provide dispute resolution services; that the process by which adjudicators are selected is fair and impartial; and that the rules are fair and unbiased (for example, the discovery procedures). *Id.* at 14, 16. The defendant also argues that there is no structural bias in the forum. *Id.* at 17. In asserting a lack of structural bias, Ryan's states that most cases considering this agreement have upheld the EDSI forum and that the Supreme Court rejects arguments based on potential, instead of actual, bias. *Id.* at 18-20.

The plaintiffs, on the other hand, argue that the EDSI arbitral forum is rife with structural bias against the plaintiffs. (Docket No. 99, Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss and Petition to Compel Arbitration and Stay Proceedings at 36.) They urge the court to follow cases that have considered the EDSI agreement substantively, including *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) and *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 995 (S.D. Ind. 2001), and found the forum to be filled with institutional bias and partiality. (Docket No. 99 at 40.) The plaintiffs cite three specific examples of structural bias: (1) EDSI has permitted Ryan's labor and employment counsel to modify and craft the rules that govern the agreement; (2) EDSI unilaterally eliminated a class action provision from the arbitration agreement, suggesting favoritism to employer-clients; and (3) the employee pool from which EDSI draws its adjudicators is comprised of employees who have been pre-selected by other signatory employers, presumably as employees that the employers trust. *Id.* at 41.

For the reasons cited by the plaintiffs and for other reasons, not only apparent to this court but also raised by the Sixth Circuit in both *Floss* and *McMullen*, this court finds that the EDSI forum is not able to provide for effective vindication of statutory claims and is an inappropriate substitute for the judicial forum.

The most compelling reason that the EDSI forum is fundamentally unable to provide an effective substitute for the judicial forum is that EDSI both exercises control over the pool of potential arbitrators and relies on the favor of its employer-clients for its livelihood. The Sixth Circuit has expressed its serious reservations about this very issue in its decision in *Floss*. While the record in *Floss* did not reflect

whether EDSI was a for-profit entity (the American Arbitration Association is not), the court speculated about the potential conflict between EDSI's financial interests and its ability to provide a neutral arbitral service. *See Floss*, 211 F.3d at 314. If EDSI were operating on a for-profit basis, its interest in maintaining the satisfaction of its corporate clients would engender a bias which, together with its control over the pool of potential arbitrators, "would render the arbitral forum fundamentally unfair." *Id.* (citing *Cole v. Burns Int'l Security Servs.*, 323 U.S. App. D.C. 133, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.")).

In *McMullen*, the Sixth Circuit reiterated its concern. There, the court struck down an arbitration agreement that it described as otherwise "commendably fair" solely because the employer exerted unilateral control over the pool of potential arbitrators. *McMullen*, 337 F.3d at 703. The Sixth Circuit in *McMullen* compared the arbitrator selection process in that agreement to EDSI's arbitration selection process that it had previously described as "fundamentally unfair" and found that it suffered from infirmities similar to the EDSI process (in an even greater degree)--a symbiotic relationship between employers and arbitrators and an inherent risk of bias in favor of the employer. *See id.* at 705.

The arbitrator selection process that troubled the Sixth Circuit in these cases is still in place. Further, the record in this case adds a crucial piece to the puzzle confirming that the arbitrator pool, and thus the forum, inherently lacks neutrality: EDSI is a for-profit enterprise. (Docket No. 82, Ex. 2, LaCoste Dep. at 105.) EDSI is reliant on the continuing satisfaction of its employer-clients for its financial viability. In fact, the record reflects that almost half of

EDSI's gross income in 2002 was generated from Ryan's annual fee. The inherent bias in this position, coupled with EDSI's role in selecting arbitrators, condemns the forum's ability to be impartial. Additionally, EDSI has designed a system whereby employers are able to exert tremendous control over the construction of two of EDSI's three pools of arbitrators. The pool of managers and supervisors is comprised entirely of representatives from EDSI's employer-clients. The pool of employees is comprised entirely of employees who are vetted by their employer-signatories, presumably as management-friendly employees. Essentially, employers pre-select two of the three pools of arbitrators, and EDSI merely arranges the individual panels from these groups,[5] already skewed in favor of management. There is

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[5] EDSI follows an artless, haphazard method of constructing lists of potential adjudicators for specific panels that confirms that the real work has already been done by the employer-signatories. Judy Kramer, EDSI's legal administrator and sole full-time employee, describes how she chooses the initial list of arbitrators when a claim arises:

> I go through the list. And first of all, I try not to put the same person on a panel twice in a row. Or if somebody is serving on a panel, I don't call that person. And I just go through and ask them if they are willing to serve at this time. And then the first three people I get is who I put down.
>
> Q. Okay. Do you have any particular methodology for doing that? Do you do it alphabetically, or do you just assign numbers and do it?
>
> A. I just said. If they're presently serving on a panel, I don't call them. And if they have just recently served on a panel, I don't call them. (Docket No. 82, Ex. 3, Kramer

little distinction between this selection process and the process condemned in *McMullen*, where the employer directly selected the pool of potential arbitrators.

The defendant argues that there are protections at the stage of panel selection that mitigate potential bias. Members of Ryan's management or staff never sit on a panel adjudicating a claim against Ryan's. (Docket No. 11 at 15.) The third adjudicator on every panel is drawn from a list of attorneys and retired judges provided by Resolute Systems, Inc., not EDSI. *Id.* Claimants and employers are able to strike potential arbitrators who are offensive for any reason at panel selection and may also strike arbitrators for cause. *Id.* The court finds that these protections are unavailing at this late stage. When the process begins with a skewed pool as to two of the three arbitrators, EDSI is fundamentally unable to provide an impartial forum. The Sixth Circuit has repeatedly signaled its disapproval of the EDSI arbitration forum on grounds including its questionable arbitrator selection process and has struck down another forum solely for this reason. This court concludes that the flaws in the arbitrator selection process, coupled with other crucial defects, are fatal to the forum's ability to effectively vindicate a claim.

Although limited discovery provisions are common in arbitration as a means of streamlining the process, the limited discovery available in the EDSI forum burdens the employee-claimant far more heavily than the employer, suggesting structural bias in favor of the employer. Both parties may request production of documents and are required to exchange witness lists and documents to be offered into evidence prior to arbitration. (Docket No. 82, Ex. 1, 2000 Rules at 4-6.)

Dep. at 118.)

However, parties are able to schedule only one deposition as of right, and additional depositions are strongly disfavored, even under the current Rules: "Either party may file a request with the adjudication panel for additional depositions, but such requests are not encouraged and shall be granted *in extraordinary fact situations only and for good cause shown.*" *Id.* at 6 (emphasis added). Employment claims often require an employee to conduct many depositions (e.g., co-workers, supervisors, etc.) to make out her case, while employers are often able to defend such claims with only one deposition--that of the employee. Thus, employees usually have a need for more discovery than employers, and stringent limitations on depositions such as those promulgated by EDSI more heavily burden the employee than the employer. Additionally, this court has previously noted that the rules of the American Arbitration Association and the Judicial Arbitration and Mediation Services/Endispute are relatively liberal in affording additional discovery "where necessary to a full and fair exploration of the issues in dispute." *See Wilks v. Pep Boys*, 241 F. Supp. 2d 860, 865 (M.D. Tenn. 2003). This liberal attitude towards discovery stands in stark contrast to EDSI's strict requirement that additional discovery should issue only in "extraordinary fact situations" and "for good cause shown."

Other aspects of the forum are troublesome and support a finding of structural bias in favor of employers. EDSI eliminated from the 1999 and 2000 Rules a phrase allowing for class actions that was part of the 1993, 1994, and 1998 versions.[6] A recent Supreme Court decision concluded that

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[6] The language providing for class actions was as follows: "These Rules and Procedures are applicable to resolve disputes involving individual or employer claims and/or claims of several parties,

whether class arbitration is permitted under an arbitration agreement that did not discuss its availability is a question of contract interpretation for the arbitrator, not the court, to decide. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 156 L. Ed. 2d 414, 123 S. Ct. 2402, 2407 (2003). In this case, EDSI unilaterally eliminated from its rules a provision allowing class actions, suggesting an intent to preclude them. Given an intentional removal, instead of mere silence, it would be difficult for an arbitrator to interpret the Agreement to allow class arbitration under the Rules. The unavailability of class arbitration again burdens employees and benefits employers. Employees must shoulder the fees of individual arbitration themselves and must summon the wherewithal to pursue individual claims that might be common to other employees; this disincentive might result in fewer claims, to the benefit of employers. Moreover, in the Fair Labor Standards Act area particularly, often each individual claim results in a small monetary remedy, whereas class actions often result in practice and programmatic change that benefit all employees.

Also, although EDSI has eliminated a cost-splitting provision from its 1999 and 2000 Rules and now requires the employer to shoulder all costs other than the initial $ 125 filing fee[7] and the employee's attorneys fees, the status of the

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including group or class actions." (Docket No. 82, Ex. 1, 1993 Rules at 1, 1994 Rules at 1, 1998 Rules at 1.) In the 1999 and 2000 versions of the Rules, the sentence ends after the words "several parties." (Docket No. 82, Ex. 1, 1999 Rules at 1, 2000 Rules at 1.)

[7] Defendant asserts in one place that the filing fee is $ 125 and in another that the fee is $ 200. (Docket No. 11 at 17; Docket No. 100, Ryan's Reply Memorandum of Law in Support of Its Motion to Dismiss and Petition to Compel Arbitration and Stay Proceedings

cost-splitting provision in arbitrations governed by earlier rules is far from clear. (Docket No. 82, Ex. 1, 1999 Rules at 5, 2000 Rules at 7.) The 2000 Rules allow claimants to choose whether the arbitration will be governed by the Rules in effect at the time of the claim's filing, or by the Rules in effect at the time the employee-claimant signed the Agreement. (Docket No. 82, Ex. 1, 2000 Rules at 2.) If the claimant elects to have the Rules from 1993, 1994, or 1998 govern, she will be subject to the cost-splitting provision of those earlier rules, which requires the costs of arbitration to be borne equally by the parties. (Docket No. 82, Ex. 1, 1993 Rules at 6, 1994 Rules at 6, 1998 Rules at 9.) Under the Sixth Circuit's articulation of the proper inquiry for determining whether cost-splitting provisions in arbitration agreements are enforceable, cost-splitting provisions are unenforceable if they would deter a substantial number of similarly situated potential litigants from pursuing arbitration because of limited financial resources. *Morrison*, 317 F.3d at 663. Given the limited means of most of these plaintiffs and the potentially high cost of arbitration, this cost-splitting provision is likely unenforceable. Although, as in *Morrison,* the offending provision is probably severable from the rest of the Agreement because of the savings clause in the Agreement (Docket No. 82, Ex. 4, Agreement P B.2.F), the defendant's silence on this matter suggests that Ryan's might attempt to enforce it.

Finally, the court is troubled by the fact that EDSI and Ryan's shared Jackson Lewis LLP for many years as their

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at 11.) It appears that the filing fee was initially $ 200 but that EDSI reduced the fee to $125 in its 1999 Rules, where it remains. (Docket No. 82, Exh. 1, 1993 Rules at 7, 1994 Rules at 7, 1998 Rules at 11, 1999 Rules at 5, 2000 Rules at 8.)

common law firm, particularly since that firm was permitted to modify the EDSI rules during that period. (Docket No. 82, Ex. 2, LaCoste Dep. at 36.) While this fact on its own is too attenuated to be considered preclusive of effective vindication of a statutory claim (especially since this conflict no longer exists[8]), it suggests an uncomfortable proximity and potential professional conflict for the attorneys involved, and, in combination with the other issues detailed above, adds to this court's finding that the forum is too structurally biased to provide an effective substitute for the judicial forum.

The defendant argues that any potential for bias is outweighed by the protections afforded by EDSI in its rules and procedures. The remedies available through EDSI arbitration are not limited; the Agreement states that a claimant preserves "all the substantive legal rights and remedies under state and federal law that [she] would otherwise have as an employee/applicant of the Company." (Docket No. 82, Ex. 4, Agreement.) The $ 125.00 filing fee that the claimant must pay may be waived upon a showing of indigency, and the employer is required to pay all costs of arbitration once a claim is filed (except the claimant's attorney's fees). Employee-claimants are afforded the right to counsel or a representative of their choice, and the employer must respond to all claims in writing. (Docket No. 82, Ex. 1, 2000 Rules at 3.) The parties may request that the arbitrators' award detail in writing the findings of fact and a statement of reasons for results reached. *Id.* at 7. The court is not convinced that these protections are sufficient to mitigate the plainly apparent institutional bias against employees. The

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[8] EDSI secured alternate counsel for all its legal affairs when the conflict became apparent, during either the *Floss* or *Geiger* litigation. (Docket No. 82, Ex. 2, LaCoste Dep. at 38-39.)

defendant also argues that potential or hypothetical bias should not condemn an arbitral forum, especially given procedural protections, when limited judicial review is available if actual bias arises in a particular forum or award. (Docket No. 11 at 18.) *See also Gilmer*, 500 U.S. 20, 30-31, 114 L. Ed. 2d 26, 111 S. Ct. 1647; *Mitsubishi Motors Corp.*, 473 U.S. at 634. The Sixth Circuit addressed this argument in *McMullen*, and its conclusion is adopted by this court:

> While this is true for allegations of potential or hypothetical bias among the arbitrators, it does not apply to an allegation, as is present here, that the arbitrator-selection process is fundamentally unfair. . . .When the process used to select the arbitrator is fundamentally unfair, as in this case, the arbitral forum is not an effective substitute for a judicial forum . . . . *McMullen*, 337 F.3d at 705.

Here, the potential for bias becomes a virtual assurance of bias when a for-profit entity seeks to provide a "neutral" arbitral service, while simultaneously relying on the continuing satisfaction of its employer-clients for its livelihood, and tailors many of its crucial procedures to favor employers. Under this scheme, EDSI is fundamentally unable to provide a neutral forum or effectively vindicate employees' statutory rights. Thus, the plaintiffs' statutory claim is not subject to compulsory arbitration.

B. Whether the Parties Have Executed a Valid Agreement

Although the court finds that the infirmities of the EDSI forum are sufficiently widespread and significant to deny the defendant's motion to compel arbitration under the first inquiry, the court also finds that the motion fails under the second inquiry. The FAA provides that an arbitration

agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2003). If a court finds a claim to be generally subject to compulsory arbitration, the court must consider whether the parties have executed a valid agreement. In determining the validity of an agreement to arbitrate, the court applies applicable state law contract principles. *See Morrison*, 317 F.3d at 666; *Floss*, 211 F.3d at 314; *Cooper v. MRM Investment Co.*, 199 F. Supp. 2d 771, 775 (M.D. Tenn. 2002). Tennessee law is properly applied in evaluating the enforceability of this Agreement, because the Rules establish that arbitrators are to apply the substantive law of the state in which employees were employed in evaluating their claims (Docket No. 82, Ex. 1, 2000 Rules at 6), here Tennessee,[9] and the parties appear to agree that Tennessee law determines the contract's validity.

The defendant urges the court to compel arbitration, arguing that the Agreement is a valid, enforceable contract. Ryan's asserts that the contractual defect that impeded the

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[9] Vickie Atchley worked as a server from approximately May 1994 to June 2002 at Ryan's in Chattanooga, Tennessee. (Docket No. 83, Atchley Decl. P 3.) Steven Ricketts worked as a server and cook from approximately July 1997 to October 2000 at Ryan's in Chattanooga, Tennessee. (Docket No. 93, Ricketts Decl. PP 3, 4.) Erric Walker worked at various Ryan's locations over an eight-year period, as follows: Jackson, Tennessee, November 1993 to November 1994; Hermitage, Tennessee, April 1995 to April 1996; Sikeston, Missouri, December 1997 to November 1999; Hermitage, Tennessee, September 2000 to June 2001. (Docket No. 1, Compl. P 9.) Walker signed the Agreement in connection with his employment at the Hermitage, Tennessee, Ryan's on September 22, 2000. (Docket No. 8, Ex. 1, Walker Agreement at 2.)

enforcement of the Agreement in *Floss* has been rectified by EDSI's revision in June 2000 of the Rules, allowing claimants to choose whether the procedures of the forum will be governed by the Rules in effect at the time of filing, or by the Rules in effect at the time the employee-claimant signed the Agreement. (Docket No. 11 at 6-7.) The defendant further asserts that, because EDSI is subject to the implied duty of good faith and fair dealing, EDSI would not amend the rules in bad faith. *Id.* at 8-9. According to the defendant, the Agreement is not an unconscionable contract of adhesion because prospective employees could have walked away from employment at Ryan's at any time instead of being bound by the terms of the Agreement, *id.* at 21-22, and because the Agreement does not contain terms that are so unreasonably harsh as to render it substantively unconscionable. (Docket No. 100 at 19.) Finally, the defendant states that plaintiffs should be bound by the agreements that they freely and voluntarily executed, (Docket No. 11 at 23), and asserts that it would be inappropriate for the court to apply a heightened standard to the requirement of employee knowledge for waiver of their constitutional rights. (Docket No. 100 at 20.)

The plaintiffs argue that the contract is unenforceable for a number of reasons. First, they assert that the Agreement suffers various infirmities in formation: that there is not adequate consideration, that the contract remains illusory under *Floss* (a defect that invalidated this Agreement in an earlier incarnation), and that there is no meeting of the minds between EDSI and employees. (Docket No. 99 at 17, 18, 23.) The plaintiffs further argue that, even if there is a valid contract, EDSI has materially breached that contract by failing to provide a fair, neutral forum. *Id.* at 34-35. Plaintiffs conclude by arguing that the Agreement itself is an unconscionable contract of adhesion and that EDSI failed to

obtain a knowing and voluntary waiver from employees of their constitutional rights. *Id.* at 44-46.

Having found that the motion to compel arbitration fails under the first inquiry, because the EDSI forum is an inadequate substitute for the judicial forum to effectively vindicate plaintiffs' statutory rights, the court is not obligated to consider the second inquiry--the validity of the arbitration agreement. However, given that the *Floss* court condemned an earlier EDSI agreement on grounds of inadequate consideration, the court will consider whether EDSI has remedied that defect in the Agreement currently at issue.

1. Adequacy of Consideration and Indefiniteness as to an Essential Element

One of the essential elements of a contract is adequate consideration, which Tennessee law defines as "either a benefit to the maker of the promise or a detriment to or obligation on the promise" or "when the promisee does something that he is under no obligation to do, or refrains from doing [that] which he has a legal right to do." *Calabro v. Calabro*, 15 S.W.3d 873, 876, 877 (Tenn. Ct. App. 1999) (quoting *Univ. of Chattanooga v. Stansberry*, 9 Tenn. App. 341, 343 (Tenn. Ct. App. 1928) and *Kozy v. Werle*, 902 S.W.2d 404, 411 (Tenn. Ct. App. 1995)) (alterations in the original). Mutual promises may constitute ample consideration for a contract, especially in the context of services contracts. *See Buraczynski v. Eyring*, 919 S.W.2d 314, 321 n.6 (Tenn. 1996); *Rodgers v. Southern Newspapers, Inc.*, 214 Tenn. 335, 379 S.W.2d 797, 800 (Tenn. 1964). Mutual promises to be bound under an arbitration agreement can constitute adequate consideration. *See Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001).

Nonetheless, "a promise constitutes consideration for another promise only when it creates a binding obligation. Thus, absent a mutuality of obligation, a contract based on reciprocal promises lacks consideration." *Floss*, 211 F.3d at 315 (citing *Dobbs v. Guenther*, 846 S.W.2d 270, 276 (Tenn. Ct. App. 1992)). One way in which a promise may fail to create a legally binding obligation is by being illusory--essentially promising nothing at all, or allowing the promisor to decide whether or not to perform the promised act. *See Floss*, 211 F.3d at 315; *Pippin Way, Inc. v. Four Star Music Co.* (*In re Four Star Music Co.*), 2 B.R. 454, 460 (Bankr. M.D. Tenn. 1979) ("A promise that does not put any limitation on the freedom of the alleged promisor but leaves his future action subject only to his own will is illusory. It is not enforceable against the one making it nor operative as a consideration for a return promise."). A promise may also be illusory if it is too indefinite to be enforceable. *See Floss*, 211 F.3d at 315; *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). A court reviewing a contract must be able to ascertain what obligations the respective parties have in the performance of the contract, and the contract must be sufficiently definite and certain to allow the court to make such a determination. *See id.; Jamestowne on Signal, Inc. v. First Fed. Sav. & Loan Ass'n*, 807 S.W.2d 559, 565 (Tenn. Ct. App. 1990); *see also Peoples Bank of Elk Valley v. ConAgra Poultry Co.*, 832 S.W.2d 550, 553 (Tenn. Ct. App. 1991).

In this Agreement, applicants for employment at Ryan's promise to submit all employment-related claims to the EDSI arbitral forum in return for EDSI's promise to provide an unbiased forum with impartial procedures and a fair hearing and decision. (Docket No. 82, Ex. 4, Agreement PP B.1, B.2.A.) In *Floss*, the Sixth Circuit struck down an earlier incarnation of the Agreement, due to the indefiniteness, and

consequent illusoriness, of EDSI's promise to provide an arbitral forum. *Floss*, 211 F.3d at 315. The *Floss* court condemned the forum because EDSI had reserved the right to change the arbitration rules without notice to or consent of employees, thereby retaining the "unfettered discretion" to alter the nature of its performance at any time while requiring a defined performance from the employee. *Id.* at 315-16. Without a definite set of procedures, EDSI's promise to provide an arbitral forum was illusory, thereby lacking mutuality of obligation and defeating consideration. *Id.*

In response to *Floss*, EDSI added a choice provision both to the Agreement and to the 2000 Rules. (Docket No. 82, Ex. 2, LaCoste Dep. at 42-43; Docket No. 82, Ex. 4, Agreement P B.2.A; Docket No. 82, Ex. 1, 2000 Rules at 2.) Under this provision, claimants may choose whether the arbitration will proceed according to the Rules in place at the time that the employee signed the Agreement or according to the Rules in place at the time the employee filed the claim. The defendant argues that, while EDSI still retains the right to unilaterally modify the Rules, the choice provision remedies the defect that proved fatal to the Agreement in *Floss* by explicitly defining the nature of its performance as one of two options that the employee can choose.[10]

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[10] The court does not credit the defendant's argument that EDSI's ability to modify the Agreement is moderated by its implied duty under Tennessee law of good faith and fair dealing, which renders its promise non-illusory. (Docket No. 11 at 8-9.) The *Floss* court did not rest its condemnation of the Agreement on EDSI's potential bad faith; rather, it targeted the elusiveness of the content of EDSI's promise, which would have rendered legal enforcement of the promise extremely difficult. *Floss*, 211 F.3d at 315-16.

EDSI's modification does address the *Floss* court's particular concern by defining the nature of its performance. Allowing a claimant to elect the procedures in place at the time she signed the agreement rather than those currently in effect at the time she files the claim might put the employee in a more favorable position than she had been prior to the choice provision, but it still does not cure the fact that, by changing the rules without notice to or consent of employees, EDSI imposes a unilateral, material change on the Agreement that employees have already signed.[11] Employees who signed agreements prior to the promulgation of the 2000 Rules are still subject to those new rules by reference, if only for long enough to refer them to another set of procedures. Furthermore, the fact remains that employees are not notified either by EDSI or by Ryan's when the Rules are modified, nor do they receive an updated copy of the Rules. (Docket No. 82, Ex. 2, LaCoste Dep. at 60-62; Docket No. 82, Ex. 6, Hart Dep. at 76-77.)

Ultimately, the choice provision does not cure the continuing illusoriness of EDSI's promise to provide a neutral arbitral forum. While the *Floss* Court focused on the fact that EDSI had a continuing right to alter or modify the terms of its

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[11] There is a provision in the Rules that allows EDSI to convene a committee consisting of representatives of each of the three arbitrator pools (including signatory employees) and EDSI to review the Rules and recommend changes to them. (Docket No. 82, Ex. 1, 2000 Rules at 7.) However, LaCoste confirms that such a committee has never been convened. (Docket No. 82, Ex. 2, LaCoste Dep. at 58.) The four revisions made to the Rules since the first set of rules were issued in 1993 have been entirely directed by LaCoste, most often in response to court decisions interpreting or affecting the Agreement. (Docket No. 82, Ex. 2, LaCoste Dep. at 45-47.)

performance, the Court also stated that illusoriness can occur when "the promisor retains the right to decide whether or not to perform the promised act." *Floss*, 211 F.3d at 315. Courts applying Tennessee law have expounded on this tenet: "It is a settled principle of contract law that a provision permitting the termination of the contract by one party at will renders the contract illusory . . . ." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1296 (6th Cir. 1991). *See also Pippin Way, Inc.*, 2 B.R. at 460 ("[A] contract with an arbitrary right or option to cancel lacks mutuality and is unenforceable.")

EDSI's agreement with Ryan's contains a cancellation provision, under which Ryan's may cancel its service agreement with EDSI on either ten or sixty days' notice, [12] resulting in both being released from their obligations. With such a cancellation, EDSI would no longer be under an obligation to provide any kind of arbitral forum to Ryan's employees.[13] Employees are not told of Ryan's cancellation

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[12] It is unclear from the record whether the Ryan's agreement continues to allow a ten-day cancellation period, or whether it is now held to a sixty-day cancellation period, as are EDSI's other clients. The Agreement to Provide Services, which governs the relationship between Ryan's and EDSI, indicates a ten-day cancellation period, but LaCoste asserts that the ten-day period should have been extended to a sixty-day period, as it has been with all EDSI's clients. (Docket No. 82, Ex. 18, Agreement to Provide Services; Docket No. 82, Ex. 2, LaCoste Dep. at 71.)

[13] LaCoste testified as follows:

> Q. Okay. After a company gives notice, and ten days passes under that provision, what is it that the company, or EDSI, no longer has to do? What services were terminated?
>
> A. Well, the company would no longer have to pay EDSI

provision in any documents provided by EDSI, nor are employees given a corresponding right under the Agreement to unilaterally cancel their own agreements with EDSI. [14] (Docket No. 82, Ex. 2, LaCoste Dep. at 82.) EDSI's ability to terminate its contracts with Ryan's employees at will, without notice to them,[15] renders its promise illusory on alternate grounds than those discussed in *Floss,* with the same effect--mutuality of obligation, and therefore consideration, is defeated. Without consideration, EDSI's contract with plaintiffs is invalid and unenforceable.

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for the ability to participate in the program, and EDSI would no longer have to provide the forum for the employee to use as a method to resolve dispute. (Docket No. 82, Ex. 2, LaCoste Dep. at 73.)

[14] Although the agreements signed by the representative plaintiffs and the agreement currently in force permit the contract to be terminated, it must be by mutual termination in writing by both EDSI and the employee. (Docket No. 8, Ex. 1, Walker Agreement at 2; Docket No. 8, Ex. 2, Ricketts Agreement at 2; Docket No. 8, Ex. 3, Atchley Agreement at 2; Docket No. 82, Ex. 4, Agreement P B.2.G.) As LaCoste himself agrees, the employee is not permitted to unilaterally give notice and cancel her obligations under the Agreement, as Ryan's may under its service agreement with EDSI. (Docket No. 82, Ex. 2, LaCoste Dep. at 81.)

[15] Although EDSI is provided with notice of Ryan's cancellation, either directly or when Ryan's ceases payment (Docket No. 82, Ex. 3, Kramer Dep. at 77), there is no indication that EDSI (or Ryan's) notifies employees of Ryan's cancellation, nor that EDSI notifies employees of the resultant cancellation of its own binding obligation, and thus contract, with employees.

2. Other Contractual Infirmities and Waiver of the Judicial Forum

Having found that the plaintiffs' statutory claims are not subject to compulsory arbitration, because of the defects in the EDSI forum, and that the parties have not executed a valid contract due to the lack of consideration, the court is not obligated to consider whether other contractual infirmities invalidate the Agreement or whether the plaintiffs knowingly and voluntarily waived their right to a judicial forum. However, because these issues have factored into the court's thinking in this case, the court will address these other issues.[16]

a. Enforceability of an Adhesion Contract

Besides being unenforceable as lacking in consideration, the Agreement also has all the hallmarks of an unenforceable adhesion contract. Under Tennessee law, an adhesion contract is a standardized form offered on what amounts to a "take it or leave it" basis, without affording the weaker party a realistic opportunity to bargain, and under conditions whereby the weaker party can only obtain the desired product or service by submitting to the form of the contract. *Buraczynski*, 919 S.W.2d at 320. *See also Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 733-34 (Tenn. Ct. App. 2003); *Pyburn*, 63 S.W.3d at 359. Applying the law to the facts at hand, there is little question but that this

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[16] Having found an invalid contract, the court need not consider plaintiffs' argument that EDSI breached that contract, nor must it address the final inquiry that governs a motion to compel arbitration: wheterh the statutory claim is within the scope of the agreement.

is an adhesion contract. The contract is a standardized form, sold by EDSI to its employer-signatories in tear-off pads. (Docket No. 82, Ex. 3, Kramer Dep. at 24-25.) It is provided to potential employees on a "take it or leave it" basis; if they do not sign, they are not considered for employment, and they are not permitted to modify any portion of the Agreement or the Rules.[17]

Adhesion contracts, however, are only unenforceable in Tennessee when the terms are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. *Buraczynski*, 919 S.W.2d at 320; *see also Pyburn*, 63 S.W.3d at 359. The plaintiffs argue that the Agreement is an unenforceable adhesion contract because it is unconscionable. (Docket No. 99 at 41.) The leading case on unconscionability in Tennessee is *Haun v. King*, 690 S.W.2d 869 (Tenn. Ct. App. 1984), which found that a

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[17] James Randolph Hart, who directs the human resources department at Ryan's, testified as follows:

> Q. Are potential employees who apply for a position at Ryan's, are they allowed to modify or strike or amend the arbitration agreement or the EDSI rules and procedures if they see something they don't like?
>
> A. They are not.
>
> Q. Or add to it in any way?
>
> A. They are not.
>
> Q. So it's sort of a take it or leave it deal?
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> A. It is. (Docket No. 82, Ex. 6, Hart Dep. at 73.)

contract is unconscionable when "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Id.* at 872 (quoting *Brenner v. Little Red Schoolhouse*, 302 N.C. 207, 210, 274 S.E.2d 206 (1981)). *See Trinity Indus., Inc. v. McKinnon Bridge Co.*, 77 S.W.3d 159, 171 (Tenn. Ct. App. 2001) (relying on the *Haun* court's articulation of unconscionability); *Overzet v. Bata Corp.*, No. 19, 1990 Tenn. App. LEXIS 349, at *8 (Tenn. Ct. App. 1990) (relying on the *Haun* court's articulation of unconscionability). The court in *Trinity Industries* characterized the unconscionability inquiry in Tennessee as a lumping together of the two showings of procedural unconscionability, which contemplates a lack of meaningful choice on the part of one party, and substantive unconscionability, which contemplates contract terms that are unreasonably harsh. *See Trinity Indus., Inc.*, 77 S.W.3d at 170-71. *Haun* directs courts undertaking an unconscionability inquiry to consider all the facts and circumstances of a particular case and find a contract unconscionable when the provisions of the contract are "so one-sided that the contracting party is denied any opportunity for a meaningful choice." *Haun*, 600 S.W.2d at 872 (quoting *Brenner,* 302 N.C. at 210).

The case for procedural unconscionability is strong here because many of the hallmarks of procedural unconscionability are present. The applicants are seeking low-wage jobs and many have limited education, while attorneys for EDSI, a corporation, have tailored the Agreement to its needs. Ryan's does not permit potential employees to modify any portion of the Agreement or Rules. Whether or not employees are even provided with a copy (to take home or read before signing the Agreement) of the Rules, which

contain material terms that are key to understanding the Agreement, is contested.[18] It is clear, however, that employees are not permitted to meaningfully consider the Agreement for any period of time, as they are required to sign it on the spot or forfeit the opportunity to be considered for employment. Potential employees may confer with an attorney before signing the Agreement, (Docket No. 82, Ex. 4, Agreement P B.2.I), but this is an empty opportunity, given the time constraints on signing and the perceived bad impression that consulting an attorney might engender in the potential employer. Also, there is no provision for employees to unilaterally revoke consent to the agreement after signing it, even if they do not obtain a position at Ryan's.

That the arbitration agreement is a clearly marked, independent agreement that explains in capital letters that parties who sign the Agreement are giving up their right to "litigation in state or federal court" does not materially mitigate the procedural unconscionability of the Agreement. Although it is a discrete document, the Agreement is bundled with other forms in the employment application. Furthermore, "litigation" is not as recognizable a term as "trial" or "jury" to persons of limited education.[19] The defendant argues that

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[18] As discussed in the factual section of this opinion, there is a dispute between the parties as to whether the Rules are provided along with the application and Agreement.

[19] The current agreement adds a provision that states in bold, capital letters: "You waive any right arising under either state or federal law to have your claim resolved by a jury. Rather, any claim you may file will be finally resolved by a panel of three neutral arbitrators." (Docket No. 82, Ex. 4, Agreement P A.2.) However, this waiver language, discussing the unavailability of a jury, is absent from earlier EDSI agreements, including each Agreement

employees have the ability to walk away from the bargain, and it is true that employees are most often presented with the Agreement before they have interviewed for the job; thus they have not invested considerable resources in the position. However, the court recognizes that a party searching for minimum wage employment may not be in as favorable a bargaining position as a potential car buyer, for example, who could easily walk away from a deal she finds unacceptable. The court also acknowledges the *Cooper* court's concern that a meaningful choice not to sign such a contract is elusive, given the increasing trend toward mandatory arbitration in employment contexts. *See Cooper*, 199 F. Supp. 2d at 778, 778 n.4. Thus, there is strong evidence of the procedural unconscionability of the Agreement.

When the factors demonstrating procedural unconscionability are combined with a review of the one-sided terms of the Agreement, the court considers this Agreement as a whole to be unconscionable. EDSI is permitted to unilaterally modify the Rules that govern arbitration, with no required input from, notice to, or consent of employees. As discussed above, no provision of the Agreement permits an employee to unilaterally give notice and cancel her obligations under the contract, although EDSI may terminate its obligation at will, correspondent with Ryan's cancellation of its contract with EDSI. The arbitrator selection process detailed in the Rules provides a veneer of employee involvement, but EDSI and the employer entirely construct two of the three pools of potential arbitrators, skewing the arbitration panels towards management. Limitations on

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signed by the representative plaintiffs. (Docket No. 8, Ex. 1, Walker Agreement; Docket No. 8, Ex. 2, Ricketts Agreement; Docket No. 8, Ex. 3, Atchley Agreement.)

discovery heavily burden employees, and the unavailability of class arbitration also works to employees' detriment. These one-sided terms, together with the manifest inequality of the parties' bargaining positions, create an unconscionable contract. Unconscionable contracts of adhesion are unenforceable in Tennessee.

b. Mutual Assent

There is strong evidence that the EDSI Agreement did not result from a meeting of the minds in mutual assent between EDSI and potential employees of Ryan's. Under Tennessee law and general contract principles, an enforceable contract must issue from a meeting of the minds of the parties in mutual assent to its terms. *See Higgins v. Oil, Chemical & Atomic Workers*, 811 S.W.2d 875, 879 (Tenn. 1991); *see also Sweeten v. Trade Envelopes, Inc.*, 938 S.W.2d 383, 386 (Tenn. 1996). The Tennessee Supreme Court has recognized that courts have moved towards an objective test to determine mutual assent, rather than characterizing their inquiry under the outdated "meeting of the minds" theory, but counsel that it still may be necessary to look beyond the words of the parties to their intent in considering mutual assent. *See Higgins*, 811 S.W.2d at 879. Tennessee courts have generally said that parties who do not read the contracts they sign cannot be heard to complain about the contracts' contents; they may not deny their obligations under those contracts but will be presumed to know their contents. *Pyburn*, 63 S.W.3d at 359. *See also, Giles v. Allstate Ins. Co.*, 871 S.W.2d 154, 156-57 (Tenn. Ct. App. 1993) (holding the plaintiff to an insurance application containing incorrect information that she signed despite her failure to read the application); *Teague Bros., Inc. v. Martin & Bayley, Inc.*, 750 S.W.2d 152, 158 (Tenn. Ct. App. 1987) (upholding the general rule but noting that the general rule is not applicable when neglect to read

was induced by stratagem, trick, or artifice by the one seeking to enforce the contract).

Despite the general rule that parties are under a duty to ascertain the contents of contracts they sign and will be held to their obligations, Tennessee courts have at times refused to hold parties to contracts they have not read. *See, e.g., Howell*, 109 S.W.3d at 735. In *Howell*, the Court of Appeals refused to enforce an arbitration clause in a nursing home admittance agreement against a plaintiff who could not and had not read the contract when the proponent of the contract had taken it upon herself to explain the contract to him, rather than ask him to read it, and had neglected to mention that he was waiving his right to a jury trial under the contract. *Id.* The proponent of the contract had not asked the plaintiff if he could read and did not read the contract to him verbatim; rather, she paraphrased the contents of the agreement. *Id.* at 732. Although the proponent of the contract explained the dispute resolution process discussed therein to the plaintiff and told him that arbitration was binding, the court thought it was crucial that she had not explained that he was waiving the right to a jury trial. *Id.* at 735. Weighing this fact along with circumstances demonstrating that the parties had not bargained over the arbitration terms and that the clause was not within the reasonable expectations of an ordinary person, the court refused to enforce the arbitration provision. *Id.*

The position of the plaintiffs in this case during the signing of their contracts with EDSI is analogous to the position of the plaintiff in *Howell*. The representative plaintiffs did not execute these agreements in mutual assent with EDSI to the contracts' terms. As discussed above, there is a real question as to whether or not the plaintiffs were provided with the Rules when they signed the contracts, which contained material terms of the Agreements. There is

also conflicting evidence about whether the parties knew what they were signing at the time they signed it. There is strong evidence, as in *Howell*, that potential employees were given misinformation about the Agreement and the arbitration process and never told they were waiving their right to a trial when the Agreement was explained to them.[20] This evidence

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[20] One of the plaintiffs, Nanella Dukes, describes the explanation she was given: "When I asked what [the packet of documents containing the Agreement was], the General Manager, Monica Head, told me that one of the documents meant that if I ever had any problems with Ryan's or Ryan's management, I had to 'go through Ryan's arbitration.' That was the only explanation he gave me, and I was never told that the 'arbitration' would prevent me from going outside the company to sue in court if Ryan's violated the law." (Docket No. 83, Declaration of Nanella Dukes P 5.) Paul Huether, a manager, explains what he was told to say if questions were asked about the Agreement: "Our supervisors at Ryan's told us during manager meetings with them, that if it came up to tell any job applicant that the arbitration agreement meant that any problems would be handled 'up the chain of command,' and that we would handle problems 'in house' first, and if the problem could not be resolved there, then it would be taken to the supervisor to resolve." (Docket No. 83, Declaration of Paul Huether P 7.) (It is unclear whether Paul Huether is the same person as one of the plaintiffs, Paula K. Reuther, joined pursuant to Docket No. 61, and if so, which of those spellings is a misspelling.) Julie Oaks describes her experience: "When I asked what they were, the manager told me that one of the documents meant that if I ever had any problems with Ryan's, I had to 'go through Ryan's' before I could go to an attorney. That was the only explanation he gave me . . . [I] was never told that these documents might prevent me from suing Ryan's in a court of law . . . ." (Docket No. 83, Declaration of Julie Oaks P 4.) Sharon Pinckney describes the explanation she was given about the arbitration agreement: "Alan Shaw told me that it would be in my best interest to sign it, that a 'board of my peers' would help decide employment any issues [sic] which arose with

leads to the conclusion that mutual assent was lacking in the execution of these agreements.

c. Waiver of Prospective Claims

There is also strong evidence that plaintiffs cannot be compelled to arbitrate their claims because they did not knowingly and voluntarily waive their constitutional right to a jury trial. (Docket No. 99 at 46-47.) The question of waiver of the right to a jury trial is governed by federal, not state, law. *See K.M.C. Co., Inc., v. Irving Trust Co.*, 757 F.2d 752, 755-756 (6th Cir. 1985). Plaintiffs rely on the Sixth Circuit's articulation in *Morrison* of the requirements for valid waiver, which in turn relies on an earlier decision of that court, which defined the inquiry into knowing and voluntary waiver as an evaluation of the following factors: "(1) plaintiff's experience, background, and education; (2) the amount of time plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances." *Morrison*, 317 F.3d at 668 (quoting *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995)). The defendant unsuccessfully attempts to distinguish the *Morrison* court's articulation of the waiver inquiry. Bound by the Sixth Circuit's en banc decision in *Morrison*, this court will inquire into whether the plaintiffs knowingly and voluntarily waived

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Ryan's, and that this was the first step I had to take if I ever wanted to sue Ryan's. Additionally, I was told by Alan Shaw and Phil Franklin that if the dispute was not resolved by a 'board of my peers,' I could still sue Ryan's." (Docket No. 83, Declaration of Sharon Pinckney P 4.)

their right to a jury trial under the factors that the *Morrison* court has articulated.

Based on the profiles of the representative plaintiffs, the experience, background, and level of education of the plaintiffs was low to mid-level. Atchley had only an eighth-grade education when she sought her employment as a server. Walker had a high school education and worked as a manager. Ricketts, who was hired as a server and cook, does not discuss his level of education. Plaintiffs had virtually no time to consider the waiver contained in the arbitration agreement and, although they were afforded the option to contact a lawyer if they chose (a provision underlined in the contracts they signed), this opportunity was not a realistic one, as discussed above. The waiver is relatively explicit in its expression that any and all disputes would be resolved "only through arbitration in the EDSI forum and NOT THROUGH LITIGATION IN STATE OR FEDERAL COURT," with capitalization as noted, but as discussed earlier, the agreement does not use more commonly understood waiver language about foregoing the right to have claims heard at "trial" or by a "jury." (Docket No. 8, Ex. 1, Walker Agreement at 1; Docket No. 8, Ex. 2, Ricketts Agreement at 1; Docket No. 8, Ex. 3, Atchley Agreement at 1.) As discussed at length above, consideration for the waiver of the judicial forum is lacking. Determining whether a valid waiver had been obtained from plaintiffs in view of the totality of the circumstances, the court finds that the plaintiffs did not knowingly and voluntarily waive their right to a jury trial.

Conclusion

Although this court recognizes the liberal federal policy favoring arbitration, it finds that the circumstances of this

case preclude submitting these claims to the EDSI arbitral forum. For the reasons stated herein, the defendant's motion to dismiss and petition to compel arbitration and stay proceedings (Docket No. 7) will be denied.

An appropriate order will enter.

10-2-03
ALETA A. TRAUGER
United States District Judge

ORDER

For the reasons expressed in the accompanying Memorandum, the Motion to Dismiss and Petition to Compel Arbitration and Stay Proceedings filed by defendant Ryan's Family Steak Houses, Inc. (Docket No. 7) is DENIED.

It is so ordered.

10-2-03
ALETA A. TRAUGER
United States District Judge

Supreme Court, U.S.
FILED
JUL 11 2005
OFFICE OF THE CLERK

(2)

No. 04-1672

In the Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,
Petitioner,

v.

ERRIC WALKER, on behalf of himself and all others similarly situated; STEVE RICKETTS, on behalf of himself and all others similarly situated; VICKIE ATCHLEY, on behalf of herself and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

EMPLOYMENT DISPUTE SERVICES, INC. *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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9 U.S.C. § 10 8

INTEREST OF EMPLOYMENT DISPUTE SERVICES, INC.

Employment Dispute Services, Inc. (hereafter "EDSI") is in the exclusive business of providing a fair and impartial arbitration forum for the resolution of employment-related disputes. Petitioner Ryan's Restaurant Group, Inc. f/k/a Family Steak Houses, Inc. (hereafter "Ryan's") is one of a number of employers that attempts to resolve employment-related disputes with employees by submission of the disputes for adjudication under the EDSI arbitration system. The fairness of the EDSI arbitration system and the governing rules were central to the United States Court of Appeals for the Sixth Circuit's decision in this matter. EDSI's interest herein is to support reversal of the Sixth Circuit's erroneous decision in order to protect the legitimacy of its arbitration system which has been recognized by numerous state and federal trial and appellate courts.[1]

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Ryan's has submitted a petition for a writ of certiorari seeking review of the judgment of the Sixth Circuit in this case. EDSI submits this brief in support of Ryan's petition for a writ of certiorari. Counsel for both Ryan's and the Respondents have consented in writing to the filing of this brief.

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[1] Pursuant to Supreme Court Rule 37, EDSI hereby certifies that no counsel for any party herein authored any portion of this brief and no entity other than EDSI made any financial contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Sixth Circuit improperly imposed a heightened "knowing and voluntary" standard that must be satisfied to give effect to the jury waiver that is a necessary component of every arbitration contract. The imposition of this standard to an arbitration contract differentiates arbitration contracts from other forms of contracts and is inconsistent with the federal policy favoring arbitration, the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and this Court's cases applying its terms.

The Sixth Circuit patently misapplied state law contract principles to justify its decision to bar enforcement of the EDSI arbitration contract. Federal appellate courts should not be allowed to cloak decisions hostile to arbitration in a perversion of state law in order to shield those decisions from further review.

The Sixth Circuit supported its anti-arbitration decision in this matter on a foundation of rank conjecture and speculation. This Court has previously rejected unsupported speculation as a basis to defeat a party's arbitration obligation.

ARGUMENT

I. The Sixth Circuit Improperly Applied a Misplaced "Knowing and Voluntary" Waiver Standard As a Prerequisite to Enforcing the Jury Trial Waiver in the EDSI Arbitration Contract.

Contrary to the Sixth Circuit's analysis in this case, this Court has consistently warned that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (hereafter "FAA") bars courts from applying special or more stringent standards to the enforcement of arbitration contracts as compared to contracts

generally. Rather, arbitration contracts must be enforced on the same basis as any other contract. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)("The FAA's purpose was to reverse the longstanding hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration contracts upon the same footing as other contracts."). Far from allowing the erection of a series of insurmountable obstacles to enforcement as did the Sixth Circuit in this case, the FAA outlines a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA's underlying purpose is to insure the consistent enforcement of private arbitration contracts. *See, e.g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

It is axiomatic that a party's execution of an arbitration contract necessarily includes a waiver of a judicial forum for resolution of any claims within the scope of the arbitration agreement. Nevertheless, the Sixth Circuit required the satisfaction of a "knowing and voluntary" waiver of the "right" to a jury trial as a prerequisite to enforcement of an arbitration agreement. *See Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005). According to the Sixth Circuit, this heightened jury waiver analysis requires a court considering enforcement of an arbitration contract to evaluate:

> (1) the executing party's experience, background and education;
>
> (2) the amount of time the executing party had to consider whether to sign the waiver, including

whether the party had an opportunity to consult with a lawyer;

(3) the clarity of the waiver;

(4) consideration for the waiver; and

(5) the totality of the circumstances.

Id.

Every arbitration contract by definition represents a waiver of the parties' jury trial rights. Yet in no case applying the FAA has this Court imposed the satisfaction of a unique "knowing and voluntary" waiver standard as a hurdle to enforcement of an arbitration contract. The explanation for the lack of such a unique analytical framework is obvious. The imposition of such a standard is patently contrary to this Court's directive in *Byrd* that arbitration contracts are to be placed on the same footing as any other contract.

General contract law principles dictate that a party who signs a contract is presumed to know its contents and is bound even if the party chose not to read the contract before signing:

> [W]e think the rule is absolute, that in the absence of fraud or sharp dealing, one is estopped to repudiate his contract, or avoid the effect of the execution of a contract, when by negligence or indifference, he has failed to read it, or have it read to him. In the absence of fraud or deceit, the rule is the same for those who can and those who cannot read, and the basis for the rule is one of estoppel, the test being negligence and indifference, and not illiteracy or incapacity.

Modern Upholstered Chair Co., Inc. v. Henry, 213 Tenn. 475, 484, 376 S.W. 2d 441, 445 (1964). It is this, among other, generally applicable contract principles that govern the enforceability of the arbitration contracts at issue in this matter. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995)(when enforcing arbitration contracts courts must apply ordinary state-law principles that govern the formation of contracts). The Sixth Circuit's imposition of a subjective five-step analysis of the contract language and the signor's intelligence that must be satisfied before a court can enforce an arbitration contract cannot be reconciled with the governing principle that an unread but voluntarily signed contract must be enforced.[2]

The imposition of a "knowing and voluntary" waiver standard of the sort envisioned by the Sixth Circuit would render unenforceable every arbitration system used across a large group of individuals. Employers such as Ryan's, Circuit City and hundreds of others insist on execution of

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[2] Any requirement that an arbitration contract satisfy a heightened waiver standard in order to give effect to the fundamental fact of arbitration – the loss of a jury trial – seems to have been implicitly rejected by this Court in *Mitsubishi Motors* where the court lumped loss of the right to a jury among the group of procedural rights that are necessarily lost in arbitration. "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. The Sixth Circuit's conclusion that satisfaction of a special multi-part analysis is required before giving effect to the jury trial waiver essential to every arbitration contract is totally inconsistent with this Court's inclusion of the loss of a jury trial among the procedural, as opposed to substantive, losses that accompany arbitration.

arbitration agreements by many thousands of applicants. Though the EDSI arbitration agreement and rules are written in easily understood language, it would be impossible to individually evaluate the "experience, background and education" of each applicant and individually apply the Sixth Circuit's four other factors to ascertain whether the arbitration agreement could be enforced at some future date. Surely the long standing federal policy favoring arbitration cannot be so easily circumvented.

II. The Sixth Circuit Misapplied Tennessee Contract Law to Excuse Its Refusal to Enforce The Arbitration Contract And To Mask its Hostility To Arbitration.

One of the justifications articulated by the Sixth Circuit for its refusal to enforce the arbitration contracts at issue was that EDSI allegedly failed to provide "adequate consideration." *Walker*, 400 F.3d at 379. However, the Sixth Circuit's analysis of the quantum of consideration is completely contrary to the Tennessee contract law the court professed to be applying. *See, e.g., Townson v. Neuhardt*, 203 S.W. 255 (Tenn. 1918)(consideration supporting a contract does not have to be adequate, it need only be valuable).

With this Court's reluctance to review the application of state law, the Sixth Circuit can shield its anti-arbitration decisions from correction by simply justifying them with a misapplication of state law. However, the Federal courts must not be allowed to mask hostility to arbitration and escape the mandates of the FAA by having a free hand to misapply state contract law principles as an excuse to refuse to compel arbitration. The Sixth Circuit's patent hostility to arbitration is "far out of step with our current strong endorsement of the federal statutes favoring [arbitration]." *Rodriguez de Quijas*

v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989). "The FAA provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitration." *Mitsubishi Motors*, 473 U.S. at 627. This Court should reverse the Sixth Circuit's decision and articulate a required analytical framework that mandates the legitimate application of state contract principles in order to advance the often repeated federal policy favoring arbitration of disputes.

III. The Sixth Circuit Improperly Refused Enforcement of the EDSI Arbitration Contract Based on Unfounded Speculation About Potential Bias.

It is undisputed that Ryan's pays EDSI a fee for it and its more than 25,000 employees to participate in the EDSI arbitration system. Based on this arms-length vendor/buyer relationship, the Sixth Circuit surmised, based on no evidence whatsoever, that EDSI would manipulate the arbitrator selection procedures to the advantage of Ryan's in order to retain the Ryan's business. *See Walker*, 400 F.3d at 385-88.[3]

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[3] The same "income stream" suspicion harbored by the Sixth Circuit could be directed at every arbitration provider, whether operating on a profit or non-profit basis. While the American Arbitration Association ("AAA") may operate as a non-profit entity, the employers who direct their arbitration needs to AAA pay the bulk of the fees that provide the vast majority of the income derived from these services. Just as in the case of EDSI, for the survival of its employment arbitration division, AAA must be motivated to provide satisfactory service and a fair arbitration process at a competitive price to the many employers that use its services. If the mere fact an employer must pay a fee for the services of an arbitration provider invalidates the independence and

However, the Sixth Circuit's refusal to compel arbitration based on rank speculation unsupported in the record is precisely the sort of anti-arbitration hostility that this Court has repeatedly rejected:

> Gilmer first speculates that arbitration panels will be biased. However, we decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).

The FAA anticipates the possibility that an arbitrator may behave in a biased or arbitrary manner and has specific provisions intended to provide a mechanism to address such situations. *See* 9 U.S.C. §10. The Sixth Circuit's anticipatory rejection of the EDSI arbitration system based on no more than speculation about potential bias is contrary to the spirit of *Gilmer* and the intent of the appeal procedures set forth in §10 of the FAA.

The Sixth Circuit's use of pure speculation about the potential for bias as the basis for declining to require arbitration under the EDSI system is fundamentally at odds with the holding in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). The arbitration rules at issue in *Green Tree* were silent on the allocation of the costs and fees associated with arbitration. Based on this silence, the

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neutrality of the arbitration provider, no contract agreeing to arbitrate through the services of a third-party could be enforced.

party resisting arbitration speculated there was a possibility she could be required to incur prohibitive costs if she pursued arbitration. *Id. at 90.* The Court noted there was no evidence in the record to demonstrate the amount of fees and costs that might be imposed and rejected mere speculation about a potential outcome as a legitimate basis to avoid arbitration:

> The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.'

Id. at 91.[4]

Importantly, the Court squarely placed the burden on the party resisting arbitration to produce sufficient evidence to support the asserted basis for avoiding arbitration. Unsupported speculation about a potential scenario and resulting outcome was rejected as insufficient to defeat an arbitration obligation. Similar to *Green Tree*, there was no evidence whatsoever in the record before the Sixth Circuit to support its conjecture about arbitral bias under the EDSI system. Accordingly, *Green Tree* requires reversal of the

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[4] This Court has repeatedly emphasized that mere speculation about the potential behavior of an arbitrator is not a basis to refuse to compel arbitration. *See Pacific Health Systems, Inc. v. Book*, 538 U.S. 401, 406 (2003); *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995).

Sixth Circuit's decision in this matter based on nothing more than unfounded suspicion and speculation.

CONCLUSION

Based on the foregoing, EDSI respectfully requests that this Court grant Ryan's petition for writ of certiorari and reverse the Sixth Circuit's erroneous decision in this matter.

Respectfully submitted,

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No. 04-1672

IN THE

Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,

Petitioner,

v.

ERRIC WALKER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; STEVE RICKETTS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, AND VICKIE ATCHLEY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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October 2005

QUESTION PRESENTED

Whether the Sixth Circuit's application of settled state-law principles to find the arbitration agreements in this case unenforceable warrants review by this Court.

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INTRODUCTION

The petition for certiorari filed by Ryan's Family Steak Houses ("Ryan's") is a grab-bag of complaints about the Sixth Circuit's fact-bound, state-law-based determination that an arbitration clause purportedly agreed to by its employees is unenforceable. The heart of the petition is Ryan's complaint that the Sixth Circuit supposedly evinced "hostility to arbitration" by subjecting the arbitration clause to "extraordinary scrutiny in a search for grounds upon which to declare [it] unenforceable." Pet. at i (question presented No. 2). Only days ago, this Court denied another petition for certiorari filed by Ryan's that made precisely the same complaint about the West Virginia Supreme Court's holding that the same arbitration clause was unenforceable under West Virginia law. *See Smith v. West Virginia ex rel. Saylor*, No. 05-205 (*cert. denied*, October 11, 2005). Ryan's petition in this case should meet the same fate as its petition in *Smith*, for a number of reasons.

First, Ryan's premises its argument on the notion that Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) applies to the supposed arbitration agreement in this case, but Section 2 does not apply because the arbitration clause is not a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof* ...." (Emphasis added). Here, the "controversy" is between Ryan's and its employees, but the arbitration clause is in a supposed contract between the employees and a *third-party arbitration service*. The controversy in no way arises out of that contract.

Second, although Ryan's claims that there is a conflict among the circuits over whether a waiver of the right to a jury trial via an arbitration clause must be "knowing and voluntary," the claimed conflict is illusory and, in any event, the issue is not dispositive. The Sixth Circuit based its decision on a number of fact-specific alternative grounds, including

the finding that the contract lacked consideration, that no contract was ever formed because there was no mutual assent, and that the arbitration clause was unenforceable because it failed to permit effective vindication of Ryan's employees' statutory rights. Those alternative holdings render the waiver issue academic.

Third, beyond the waiver issue, Ryan's petition rests primarily on its pejorative characterization of the Sixth Circuit's application of settled state-law (and choice of law) principles to highly idiosyncratic facts. That the Sixth Circuit held an arbitration clause unenforceable does not mean that it has adopted a principle of "hostility" to arbitration that places it in conflict with the holdings of this Court or the decisions of other circuits. Rather, the decision below reflects only that the application of state-law contract principles to an arbitration agreement will sometimes — as in the extreme circumstances here — render the agreement unenforceable. Absent a real conflict among the circuits on an issue of federal law, there is no need for this Court to review such a decision.

REASONS FOR DENYING THE WRIT

I. The Arbitration Clause at Issue Is Not Subject to the FAA.

The underlying premise of all of Ryan's arguments is that the arbitration clause at issue is subject to Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which provides for the enforceability of certain types of arbitration agreements subject to generally applicable state contract law defenses. *See* Pet. 1. The unusual agreements in this case, however, fall outside the scope of Section 2.

As Ryan's admits, the arbitration agreements here are not contained in contracts between it and its employees. Instead, "[t]he agreement to arbitrate ... is between the individual Ryan's employee and Ryan's third-party provider of alternative dispute resolution services, Employment Dispute Services, Inc. ('EDSI')." Pet. 2; *see also Walker v. Ryan's Fam-*

ily Steak Houses, Inc., 400 F.3d 370, 374 (6th Cir. 2005) ("Unlike the typical pre-employment arbitration agreement which involves a contract between the applicant and his or her potential employer, Ryan's Arbitration Agreement is not between the applicant and Ryan's. Rather, it is between the applicant and [EDSI]. EDSI is a South Carolina corporation whose sole business is the marketing and administration of the Employment Dispute Resolution Program."). The employment agreements between Ryan's and its employees do not themselves contain provisions obligating either party to arbitrate. Ryan's has entered into a separate agreement with EDSI to arbitrate disputes with its employees. *Id.* at 375.

Section 2 of the FAA provides only that two types of arbitration agreements are enforceable (subject to ordinary state-law contract defenses): (1) *pre-dispute* agreements that are included in "a contract evidencing a transaction involving commerce" and that apply to "a controversy thereafter arising out of such contract or transaction," 9 U.S.C. § 2; (2) *post-dispute* agreements to arbitrate "an existing controversy" arising out of a contract or transaction involving commerce. *Id.*

The agreements in this case are not post-dispute agreements, so they are subject to the FAA only if they constitute enforceable pre-dispute agreements under Section 2. As the plain language of Section 2 indicates, "[t]o establish a valid arbitration agreement under the FAA, there must be evidence of a written provision in a maritime transaction or commercial contract providing that controversies *arising from the contract or transaction* are subject to arbitration." *F.D. Import & Export Corp. v. M/V REEFER SUN*, 248 F. Supp. 2d 240, 246 (S.D.N.Y. 2002) (emphasis added).[1]

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[1] Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3-4, moreover, apply only to agreements within the scope of Section 2. *See Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201-02 (1956).

Here, the underlying "controversy" is between Ryan's and its employees over Ryan's failure to comply with the Fair Labor Standards Act's minimum wage and overtime requirements. That controversy arises out of the employees' relationship with Ryan's, not out of their purported arbitration contracts with EDSI. Thus, to the extent the employees' contracts with EDSI purport to require them to arbitrate their controversy with Ryan's, those contracts are not within the scope of Section 2 of the FAA, because the "controversy" is not one "arising out of such contract or transaction" — *i.e.*, the contract or transaction between the employees and EDSI.

Although the Sixth Circuit in this case appears to have assumed that the FAA applies to the arbitration clause at issue (*see Walker*, 400 F.3d at 376-77), this Court should not take up a case concerning the effect of the FAA in circumstances where it is apparent that the Act does not apply. Indeed, this Court could not ignore the question of Section 2's inapplicability to the arbitration agreements at issue, because that question of the scope of the statute is "antecedent" to all of the questions presented by Ryan's. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *see also Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (addressing statutory question that was "'predicate to an intelligent resolution' of the question presented."); *cf. United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993) (holding that a court should address whether a statute exists before considering what it means, even if the parties do not raise the issue).

II. The Question Whether a Waiver of the Right to a Jury Trial Through Agreement to an Arbitration Clause Must Be "Knowing and Voluntary" Does Not Merit Review in This Case.

One of the Sixth Circuit's alternative reasons for holding the arbitration agreements in this case unenforceable was that the agreements did not reflect a knowing and voluntary waiver of the employees' constitutional right to a jury trial on

the claims at issue in the case. Ryan's contends that there is a conflict among the circuits over whether such a waiver of jury trial rights must be knowing and voluntary, but the cases it cites provide no support for this assertion.

Ryan's relies principally on a footnote in the Third Circuit's decision in *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998), which it says rejected such a "heightened standard" for waiver. Pet. 5. The issue addressed in the *Seus* footnote, however, was not whether the waiver of Seventh Amendment jury rights in an arbitration agreement must be knowing and voluntary, but rather whether the waiver of *statutory rights* under Title VII must be knowing and voluntary. *Seus*, 146 F.3d at 183-84 n.2. Neither the *Seus* footnote nor any other part of the opinion addressed or even mentioned the standard for waiver of constitutional rights. The decision thus does not conflict with the Sixth Circuit's statements about waiver in this case.

Ryan's further asserts that the Eighth Circuit "appears to have" rejected the knowing and voluntary waiver standard in *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997). But *Patterson* "appears to have" done no such thing. None of the words "knowing," "voluntary," "waive," and "waiver" appears on the cited page in *Patterson* or, indeed, *anywhere* in the opinion. Nor is there any sign that the *Patterson* court considered, let alone decided, any question of waiver of constitutional rights. The issue in *Patterson* was whether Title VII rights could be vindicated through arbitration, not the standard for waiver of constitutional rights.

In short, the only two cases that Ryan's contends are in conflict with the decision below on the knowing and voluntary waiver point address issues different from the one discussed by the Sixth Circuit below.[2] There is no conflict

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[2] Similarly, the cases Ryan's cites as agreeing with the Sixth Circuit or reserving the issue also did not involve the question of waiver of the

(*Footnote continued*)

among the circuits. Beyond its erroneous assertion that there is such a conflict, Ryan's presents no argument to suggest that the Sixth Circuit's decision is incorrect or that the issue is otherwise important enough to merit review by this Court.

Moreover, the knowing and voluntary waiver issue is unnecessary to the resolution of this case. The Sixth Circuit's decision rested on a number of alternative grounds, the majority of which reflected generally applicable state-law contract doctrines that rendered the agreements here invalid or unenforceable. Specifically, the court held that the agreements lacked consideration and were therefore unenforceable under Tennessee law, *Walker*, 400 F.3d at 378-81; that they were not contracts under Tennessee law because they did not result from a meeting of the minds in mutual assent, *id.* at 383-84; and that they were unenforceable because structural flaws in the EDS arbitration system operated to prevent the employees from effectively vindicating their statutory rights. *Id.* at 385-88.

None of these alternative grounds depends in any way on the court's analysis of the knowing and voluntary waiver point. Moreover, because the waiver issue is a constitutional one, the Court would be obligated not to reach it if the Sixth Circuit's decision could be affirmed on any other basis. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999). Thus, the waiver issue would only be before the Court if the Court were not only to address each of the Sixth Circuit's alternative holdings, but also reverse them. Because those alterna-

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constitutional right to a jury trial, but, like *Seus*, the distinct question of whether arbitration involves a waiver of substantive statutory rights under Title VII and, if so, whether such a waiver must be knowing and voluntary. *See Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 n.2 (4th Cir. 1999); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997).

tive holdings involve fact-bound and primarily state-law issues, they are not themselves worthy of review, and their presence thus constitutes a compelling reason not to take this case to address the waiver issue (even if that issue itself merited review, which, as explained above, it does not).

III. The Court of Appeals' Application of State-Law Contract Principles Does Not Reflect "Hostility" to Arbitration or Otherwise Present Any Issue Meriting This Court's Attention.

Recognizing that the Sixth Circuit's alternative bases for not enforcing the arbitration agreement all rested on state-law grounds, Ryan's attempts to repackage them as a federal issue by asserting that together they reflect "hostility" to arbitration in violation of Section 2 of the FAA and the principles of such decisions as *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Ultimately, however, the only evidence of "hostility" that Ryan's musters is that the Sixth Circuit supposedly erred in applying principles of Tennessee contract law. *See* Pet. 13-16. Such claimed errors in the application of state law to particular facts are exactly the types of matters this Court does not sit to review, and the assertion that they were motivated by judicial "hostility" does not transform them into certworthy issues.

Other than the supposed errors in application of state law in this particular case, there is no basis for any suggestion that the Sixth Circuit is somehow out of step with the principles established by this Court's case law or that of other circuits. The courts are in broad agreement that (assuming its applicability for the sake of argument) Section 2 of the FAA supersedes state-law principles that would render arbitration agreements generally unenforceable. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-72 (1995). Nonetheless, whether any particular agreement to arbitrate is valid and enforceable remains an issue determined by generally applicable state contract-law principles. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In other

words, the FAA is intended to make arbitration agreements to which it applies "as enforceable as other contracts" under state law, "but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967).

Thus, this Court has held that courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions," nor may state law discriminate against arbitration clauses or otherwise place them on an "unequal footing" with other contractual provisions. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Otherwise, however, "state law may be applied 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,'" and thus "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 686-87 (citation omitted).

Nothing in the Sixth Circuit's opinion in this case or other cases suggests that it has disregarded these principles. True to such principles, the Sixth Circuit's leading cases on arbitration emphasize the federal policy favoring arbitration and the need to avoid judicial hostility to arbitration agreements. *See, e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 652-53 (6th Cir. 2003) (en banc) (citing the "liberal federal policy favoring arbitration agreements," and recognizing that the Supreme Court "has repeatedly 'rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law'"). Indeed, the Sixth Circuit has not hesitated to reverse district court rulings that it perceives as reflecting hostility to or discrimination against arbitration

agreements. *See Cooper v. MRM Investment Co.*, 367 F.3d 493, 508-09 (6th Cir. 2004).[3]

The occasional judicial invalidation of, or refusal to enforce, an arbitration agreement through the application of state law contract principles merely reflects a basic attribute of Section 2 — that arbitration agreements may be held unenforceable based on generally applicable contract principles — and thus cannot itself demonstrate "hostility" to arbitration. Indeed, the cases cited by Ryan's prove the point. Ryan's emphasizes that what it considers to be the proper approach to arbitration agreements is exemplified by the rulings of the United States Court of Appeals for the Seventh Circuit. *See* Pet. 12-13 (citing *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999); *Oblix, Inc. v. Winiecki*, 374 F.3d 488 (7th Cir. 2004)).

What Ryan's does not tell the Court is that the Seventh Circuit — the very court whose approach to arbitration agreements Ryan's supposedly endorses — has itself held the Ryan's arbitration clause unenforceable for one of the same reasons relied on by the Sixth Circuit below: lack of consideration. In *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), the Seventh Circuit struck down the Ryan's agreement because it found that "the arbitration agreement between EDS and Penn contains only an unascertainable, illusory promise on the part of EDS," *id.* at 759, and that Ryan's acceptance of applications for employment from job-seekers could not itself constitute consideration for the agreement, *id.* at 760 — findings identical to the conclusions of the Sixth Circuit in this case. Indeed, the Seventh Circuit

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[3] In *Cooper*, the Sixth Circuit chided a district court for having "expressed hostility to the arbitration of employment discrimination claims" and for having "indulged its belief that employers should not be allowed to require arbitration of statutory discrimination claims" — a belief the court of appeals found "incompatible with the strong congressional policy favoring arbitration." *Id.*

expressly endorsed the Sixth Circuit's previous decision striking down the Ryan's arbitration clauses for lack of consideration in *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000).

The Seventh Circuit's decision in *Penn* demonstrates the fallacy of Ryan's contention that one can infer forbidden hostility to arbitration merely from a court's refusal to enforce a particular arbitration clause. As *Penn* shows, even a court that is friendly to arbitration and whose general approach to arbitration agreements Ryan's fully endorses may legitimately balk when confronted with an agreement that, like the Ryan's agreement, "carries a good joke too far."[4]

Moreover, Ryan's arguments fail to recognize that the application of state law to defeat an arbitration agreement is only problematic under the FAA if it treats arbitration clauses differently or less favorably than other types of contractual provisions. *See Doctor's Associates*, 517 U.S. at 686-87. But even while contending, incessantly yet unconvincingly, that the Sixth Circuit misapplied various principles of Tennessee contract law (*see* Pet. 13-16), and asserting that the court did so "discriminatorily" (Pet. 13), Ryan's identifies nothing in the reasoning of the court that treated the agreement at issue here differently *because it was an arbitration agreement.* Absent a showing that the principles applied by the Sixth Circuit discriminated against arbitration clauses specifically, Ryan's arguments reduce to nothing more than assertions that the Sixth Circuit erred in applying garden-variety Tennessee contract law — assertions that would not justify review by this Court even if they were not convincingly refuted by the Sixth Circuit's careful explanation of the state-law bases for its holding.

Finally, Ryan's hyperbolic assertions that, under the Sixth Circuit's approach, "no contract would ever be en-

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[4] *Cf. Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

forceable if presented by a large corporation to an individual of limited education and means" (Pet. 15) are flatly contradicted by Sixth Circuit case law. The Sixth Circuit has regularly enforced arbitration agreements even where there is disparity in bargaining power, so long as their terms are not substantively unconscionable. *See Morrison*, 317 F.3d 646; *Cooper*, 367 F.3d at 500-02. Moreover, in the only two decisions in which the Sixth Circuit has so far cited its opinion in this case, the court has declined to hold arbitration clauses unenforceable. *See Howell v. Rivergate Toyota, Inc.*, 2005 WL 1736582 (6th Cir. July 25, 2005); *Pennington v. Frisch's Restaurants, Inc.*, 2005 WL 1432759 (6th Cir. June 17, 2005). And the court's most recent published opinion concerning arbitration of employment claims, *Scovill v. WSYX/ABC*, __ F.3d __, 2005 WL 2454626 (6th Cir. Oct. 6, 2005), similarly enforces an arbitration agreement against an employee (albeit while severing one unconscionable part of the agreement).

In sum, nothing about the decision in this case or the Sixth Circuit's more general jurisprudence suggests a court that is either hostile to arbitration or out of step with either this Court's arbitration case law or that of other circuits.

IV. The Court of Appeals' Choice of Law Analysis Is Correct and Does Not Reflect a Conflict Among the Circuits on Any Issue of Federal Law.

Ryan's begins its discussion of choice of law by misstating the Sixth Circuit's holding. Ryan's asserts that, "by necessary implication," the Sixth Circuit held that Tennessee law applied to "every single Ryan's employee residing in the twenty-two (22) other states where Ryan's does business." Pet. 17. The Sixth Circuit, however, held no such thing. Its holding applies only to the named plaintiffs (all Tennessee residents) and the 18 other individuals who opted in to this action. The court held that Ryan's had failed to demonstrate that there was a conflict of laws involving the states of residence of those 18 individuals, not that Tennessee law would

apply regardless of what state the plaintiffs hailed from. *See Walker*, 400 F.3d at 377 (framing the issue as whether the district court erred in applying Tennessee law to Ryan's "motion to compel arbitration with respect to *these opt-in plaintiffs*") (emphasis added).

Continuing its mischaracterization of the court of appeals' holding, Ryan's contends that the Sixth Circuit's ruling "violated Tennessee's general adherence to the doctrine of *lex loci contractus*." Pet. 17. Leaving aside that a mere alleged error in applying state choice of law rules is not in itself a ground for review by this Court, Ryan's claim that the Sixth Circuit ignored Tennessee law on this point is flatly wrong. The court in fact *began* with the proposition that "Tennessee law applied when analyzing the enforceability of the three named Plaintiffs' Arbitration Agreements *because the agreements were executed in Tennessee* and substantially performed in that state." *Walker*, 400 F.3d at 377 (emphasis added).

The court went on to apply the same law to the opt-in plaintiffs not because of a sudden change of heart on the applicability of *lex loci contractus*, but as a result of the application of another well-settled, black-letter principle of law: No choice of law issue is presented if the law of the forum state "is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 377 (quoting *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985)). Tennessee, in common with most other jurisdictions, adheres to this principle. *See Hataway v. McKinley*, 830 S.W.2d 53, 55 (Tenn. 1992) (stating that in determining a choice of law issue, "[t]he first issue we address ... is whether there is a conflict" of laws); *see also Wayland v. Peters*, 1997 WL 776338, at *1 (Tenn. App. Dec. 17, 1997) ("As a preliminary issue to deciding which state law applies, it must be determined whether an actual conflict of law exists.").

Without attempting to show that there is a conflict between Tennessee law and that of any state where any particu-

lar opt-in plaintiff resides (and suggesting, moreover, that it was incumbent on both the District Court and the Sixth Circuit, not Ryan's, to ferret out such a conflict; *see* Pet. 18), Ryan's asserts that a conflict of laws must exist because the Eighth and Eleventh Circuits and various trial-level state and federal courts have reached different decisions about whether to enforce Ryan's arbitration agreements. *See* Pet. 18-19. Ryan's argument, however, fails to come to grips with the Sixth Circuit's holding that different results when common legal principles are applied to a particular set of facts "do not establish a material conflict in basic contract principles among the states." *Walker*, 400 F.3d at 378. Ryan's does not point to any precedents contradicting the Sixth Circuit on this point. Nor does it even attempt to identify any underlying conflicts in *principle* between the laws of potentially relevant states; it merely rests on the differences in outcome, which are insufficient to demonstrate a true conflict of laws. *See* Pet. 20-21. As this Court has recognized, state contract law is "is not at its core 'diverse, nonuniform, and confusing,'" *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995), and Ryan's offers no reason why this Court should second-guess the Sixth Circuit's conclusion that any differences among lower courts in other jurisdictions do not reflect real conflicts of law.[5]

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[5] In any case, determining whether the differences in outcomes of the primarily trial-level cases Ryan's cites reflect true conflicts of law among relevant jurisdictions or merely the inevitable differences in application of the same legal principles that result from the great number of individual courts and judges in this country would involve an inquiry unsuitable for this Court's limited time and resources. *See, e.g., Shutts*, 472 U.S. at 816 (leaving it to lower court to determine whether conflicts were genuine). Moreover, we do not concede that if there were a genuine conflict of laws (or a conflict were to develop if more plaintiffs were to sign on), it would necessarily violate *Shutts* to apply Tennessee law in light of Ryan's relationship to the state and Tennessee's interest in application of its law. In light of the Sixth Circuit's ruling and the current posture of the case, however, that issue is not now presented.

Ryan's reliance on a supposed "split among the Circuits concerning the enforceability of Ryan's arbitration agreement" adds nothing to its choice of law arguments. This Court uses its certiorari jurisdiction to resolve conflicts among the circuits over "important federal question[s]," S. Ct. R. 10(a), not over the application of state law to particular contracts. Indeed, because it does not have ultimate authority over state law, this Court cannot definitively resolve such conflicts.

The supposed "conflict," in any event, is illusory. In *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001), the Eighth Circuit not only was applying Missouri law, but it did not even address the same types of issues as the Sixth Circuit in this case. The principal issue in *Lyster* was whether the arbitration agreement applied by its terms to EEOC matters, *see id.* at 946-47, a question of contract interpretation not presented by this case. After resolving that issue, the Eighth Circuit briefly addressed and rejected the argument that the agreement was unconscionable because it imposed unreasonable arbitration fees on the employee. *Id.* at 947.[6] The Eighth Circuit nowhere addressed the issues that were decisive in this case: lack of consideration and mutual assent, and employment of a structurally flawed arbitration system that did not permit effective vindication of the employees' underlying substantive rights. Decisions addressing different issues under the laws of different states hardly reflect a circuit-split.

Ryan's reliance on *Hudson v. Ryan's Family Steak Houses, Inc.*, 212 F.3d 601 (11th Cir. 2000) (table), is weaker yet. That decision is unpublished and, under the rules of the Eleventh Circuit, is not considered a binding precedent. Moreover, unlike many unpublished opinions, its text is not

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[6] By contrast, the Sixth Circuit in this case found that it did not have to reach the question of unconscionability under state law. *See Walker*, 400 F.3d at 385.

even available on Westlaw. The existence of the decision does not establish a conflict with the Sixth Circuit, or any other circuit, over any issue, whether of federal or state law.

Ultimately, Ryan's fundamental complaint appears to be that the Sixth Circuit's decision makes "the enforceability of the Ryan's arbitration program depend[ent] solely on geography." Pet. 19. But the possibility of outcomes being dependent on geography is an inevitable consequence of a system in which the enforceability of agreements to arbitrate depends, as this Court has repeatedly held it does, on state contract law. Indeed, Ryan's plea for national uniformity contradicts its own contention that the Sixth Circuit erred in applying Tennessee law to opt-in plaintiffs residing outside Tennessee. Ryan's attack on the "arbitrar[iness]" of a system that permits divergent results in different jurisdictions (Pet. 19) reveals that its real problem with the decision below is not that the court applied the same law to all the plaintiffs, but that Ryan's thinks the court got the result wrong. In short, Ryan's wants a uniform national ruling that its agreements are enforceable — but its own recognition that it is "well-established" that state law governs the enforceability of arbitration agreements (Pet. 8) demonstrates that it is not entitled to such a uniform nationwide rule.

V. The Court of Appeals' Holding That Ryan's Structurally Flawed Arbitration System Is Unenforceable Presents No Issue Meriting Review by This Court.

Ryan's ends by contending that the Sixth Circuit erred in holding that "EDSI's arbitral forum is not neutral and, therefore, the agreements are unenforceable." *Walker*, 400 F.3d at 385-86. Again, the court's holding in this respect was an alternative ground for its decision and need not be reached in light of the court's decision that the agreements are unenforceable on state contract-law grounds. Even if the Sixth Circuit's analysis of EDSI's lack of neutrality were the sole ground for its decision, however, certiorari would be unwarranted.

Ryan's contends that the Sixth Circuit's decision conflicts with decisions of this Court holding that a court should not refuse to enforce an arbitration agreement because of "speculation" about its inadequacy, and with decisions of other lower federal courts holding that challenges to the impartiality of a particular arbitrator or arbitral panel under Section 10(a)(2) of the FAA, 9 U.S.C. § 10(a)(2), should be made through a post-arbitration application to vacate the award. *See* Pet. 22-24.

Although the general principle that post-arbitration review is adequate to weed out the occasional problem of a biased arbitrator is widely accepted, the courts have also recognized that there are circumstances in which the system of arbitration created by a particular agreement is so unfair that it is appropriate to excuse a party from participating in the process. As the Fourth Circuit explained in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (Wilkinson, J.), "[g]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance," and "[o]nly after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award." *Id.* at 941. However, where one party has "so skewed the process in its favor" that the other "has been denied arbitration in any meaningful sense of the word," a court may intervene to relieve the disadvantaged party of the obligation to take part in a process "that is crafted to ensure a biased decisionmaker." *Id.* at 941, 938; *accord, McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 & n.7 (6th Cir. 2004) (following *Hooters* and recognizing that although courts may not presume arbitral partiality and generally should review claims of bias after an arbitration has occurred, "procedural unfairness inherent in an arbitration agreement may be challenged before the arbitration").

Ryan's cites no precedents that reject the principle established in the *Hooters* and *McMullen* cases, permitting a pre-arbitration challenge to an arbitration agreement in the ex-

treme circumstances where the arbitration procedures are "so wholly one-sided as to present a stacked deck." *Hooters*, 173 F.3d at 940. Here, that is exactly what the Sixth Circuit found, based on multiple factors including the qualifications and manner of selection of arbitrators, the financial interrelationship between Ryan's and EDSI (in which Ryan's accounted for 42% of EDSI's annual revenues), and the extremely limited discovery permitted by the rules. That EDSI has chosen, in this Court, to file a brief supporting one of the two parties to the dispute for which it supposedly is to provide a neutral adjudication only underscores the suspect nature of the arbitral forum here.

Ryan's cites cases holding, on their own specific facts, that showings concerning a single one of these factors in isolation were not sufficient to render an arbitration system subject to attack. Pet. 25-26. None, however, addressed the combination of circumstances that the Sixth Circuit found here rendered the arbitral forum unfair and inadequate. Astonishingly, Ryan's also asserts that the Seventh Circuit in *Penn v. Ryan's Family Steak Houses*, 269 F.3d at 758, "ruled" that the supposed "procedural safeguards built into the EDSI system" "were in line with other arbitration systems which have passed constitutional muster." Pet. 27. That is not true. What the Seventh Circuit actually *ruled* was that "*we need not resolve whether the EDS system is so deeply flawed that it should be rejected on its face*," 269 F.3d at 758 (emphasis added), because the court concluded that the arbitration agreement was unenforceable on the ground that it "contains only an unascertainable, illusory promise on the part of EDS." *Id.* at 759.

Ryan's misrepresentation of the Seventh Circuit's decision in *Penn* underscores the hollowness of its claim that this case presents conflicts among the circuits requiring this Court's resolution. Rather, in its ruling on the bias inherent in the Ryan's arbitration procedure, as in its other holdings, the Sixth Circuit applied settled, widely-agreed-upon principles

to the unusual and fact-bound circumstances of this case and Ryan's unconventional arbitration agreements. This Court need not, and should not, delve into either the Sixth Circuit's assessment of the bias inherent in the Ryan's arbitration system or into the fact-specific applications of state law that serve as the basis for its alternative holdings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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(4)

Supreme Court, U.S.
FILED
NOV 4 - 2005
OFFICE OF THE CLERK

No. 04-1672

In the Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,
Petitioner,

v.

ERRIC WALKER, on behalf of himself and all others similarly situated; STEVE RICKETTS, on behalf of himself and all others similarly situated; VICKIE ATCHLEY, on behalf of herself and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner, Ryan's Family Steak Houses, Inc. (hereinafter "Ryan's"), respectfully submits the following reply brief in support of its petition for certiorari. For both the reasons that follow as well as those articulated in Ryan's petition, this Court should review the erroneous decision of the United States Court of Appeals for the Sixth Circuit.

In opposing review by this Court, the Respondents incredibly maintain for the first time that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (hereinafter the "FAA"), does not apply to this dispute involving the validity of Petitioner's national arbitration program. Not only is this position legally incorrect, it sharply conflicts with the position taken below by the Respondents before the district court and the Sixth Circuit.

Respondents additionally argue that no split among the circuits exists with respect to the heightened "knowing and voluntary" waiver standard used by the Sixth Circuit in ruling Respondents did not make an informed decision in agreeing to arbitration of their employment-related disputes with Ryan's. A demonstrable division among the circuits does indeed exist with respect to the propriety of applying this heightened standard. That split should be resolved by the Court.

Respondents' Eleventh Hour Assertion that the Federal Arbitration Act is Not Implicated By the Instant Petition is Wholly Inconsistent with the Position Taken Below.

In opposing review by this Court, the Respondents for the first time argue that the FAA does not apply. The Respondents never took this position before the district court

or the Sixth Circuit. In fact, the Respondent relied on the FAA in opposing arbitration at the district court level:

> The FAA provides that arbitration clauses are not enforceable if they are invalid under state common law. *See* 9 U.S.C. § 2.
>
> * * *
>
> Ryan's suggests that federal law favors arbitration, but that is *only* true in cases where a valid agreement exists. The FAA does not establish a presumption that a valid arbitration agreement exists – it only favors arbitration *after* that fact has been established. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 943-44 (1995) ('arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – if the parties have agreed to submit to arbitration.'). To apply the presumption of formation of an agreement to arbitration 'would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that if they have agreed to arbitrate.' *Hendrick v. Brown & Root, Inc.*, 500 F. Supp. 2d 527, 538 (E.D. Va. 1999). Indeed, the FAA provides that a federal court may order a party to arbitrate only 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.' 9 U.S.C. § 4.
>
> * * *
>
> The purpose of the Federal Arbitration Act (FAA) is to 'place arbitration agreements upon the same footing as other contracts.' *Gilmer v. Interstate/Johnson Lane*

> *Corp.*, 500 U.S. 20, 24 (1991). The FAA expressly provides that arbitration agreements may be challenged and invalidated on any generally applicable contract principle, stating that such contract 'shall be valid save upon any grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2.

(Pls.' Mem. in Supp. of Their Resp. In Opp'n to Def.'s Mot. to Dismiss and Pet. to Compel Arbitration and Stay Proceedings, and in Supp. of Pls.' Mot. for a Recession of the EDSI Arbitration Agreement and Pls.' Renewed Mot. for Ct.-Supervised Notice at pp. 3, 15, 41)

Similarly, in defending the district court's ruling before the Sixth Circuit, the Respondents again relied heavily on the FAA and federal case law promulgated thereunder. (Brief of Appellees/Resp'ts at pp. 19-24, 35). At no time did the Respondents take the position they now forward in an attempt to avoid review by this Court. The inconsistency could not be more clear.

The district court relied in part on the FAA and the federal case law decided thereunder in refusing to enforce the arbitration agreements at issue and the Respondents never took exception to that ruling before the Sixth Circuit. Respondents should now be barred at the outset from adopting their inconsistent position on the applicability of the FAA. *E.g., In re Charfoos*, 979 F.2d 390, 395 (6th Cir. 1992) ("[I]t is a long-standing principle of jurisprudence that an appellate court should not pass on issues not raised at the trial level."); *see also Singleton v. Wulff*, 428 U.S. 106, 119-20 (1976).

Respondents assert that the agreements at issue are outside the coverage of the FAA because the underlying contracts or transactions at issue arising out of the payment of wages involve the Respondents and Ryan's, not EDSI. According to the Respondents' brief in opposition, "Thus, to the extent the employees' contracts with EDSI purport to require them to arbitrate the controversy with Ryan's, those contracts are not within the scope of Section 2 of the FAA, because the 'controversy' is not one 'arising out of such contract or transaction' – *i.e.*, the contract or transaction between the employees and EDSI." (Resp'ts' Br. in Opp'n. at p. 4).

Respondents are essentially arguing that their dispute is not with EDSI and, therefore, they are not required to arbitrate because there is no controversy arising out of their agreement with EDSI. The fatally flawed logic of this argument is exposed when viewed in light of this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1990). In *Gilmer*, the arbitration agreement at issue was between the stockbroker and the securities exchange, not the stockbroker and his employer. *See Gilmer*, 500 U.S. at 23-25. Nevertheless, this Court compelled arbitration of the employee's age discrimination claim against his employer. *See id. see also Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986) (employees of brokerage firm may be entitled to the rights and privileges of an agreement between the firm and its customers although the employee themselves are not parties to the agreement); *Nesslage v. York Sec., Inc.*, 823 F.2d 231, 233 (8th Cir. 1987). Under Respondents' reasoning, this Court in *Gilmer* would have never reached the issue of whether federal statutory claims are appropriately referred to arbitration because there would have been no controversy between the Plaintiff and the exchange subject to arbitration. Indeed, the security industry's entire

arbitral scheme would be instantly invalidated if Respondents were correct.

In addition, Respondents completely ignore the fact that Ryan's *is expressly stated* to be a third-party beneficiary of the arbitration agreement between the Respondents and EDSI. The Respondents' argument further flies in the face of the fact that the FAA Section 2 "involving commerce" language has breadth equal to Congress's power to regulate under the Commerce Clause. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967). The power granted under the Commerce Clause is vast, reaching even purely intrastate activities which merely "affect" interstate commerce. *See Hadel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-77 (1981).

In *Allied Bruce-Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995), this Court had little difficulty finding that an arbitration agreement between a home owner and a pest control service had adequate interstate commerce nexus to bring the agreement under the FAA. Application of the FAA was evidenced by the pest control company's interstate operation and its use of raw materials purchased from out of state. *See id.* at 282.

Respondents cannot avoid review by claiming, for the first time, that the FAA is inapplicable to Ryan's efforts to compel arbitration of this dispute.

A Circuit Split Clearly Exists with Respect to the Application Of the Knowing and Voluntary Standard.

Following the Ninth Circuit,[1] the Sixth Circuit[2] below applied a knowing and voluntary waiver standard in reaching the conclusion Respondents had not adequately waived their right to a jury trial. Petitioner pointed to case law out of the Fifth and Eighth Circuits[3] where those courts declined to adopt this heightened standard as well as case law out of the First, Fourth and Seventh Circuits[4] which have acknowledged the split.

Respondents unconvincingly attempt to distinguish the aforementioned cases by stating that they address only the issue of whether an individual signing an arbitration agreement had knowingly and voluntarily waived their right to litigate federal statutory claims in court and did not specifically address waiver of the constitutional right to trial by jury. Respondents point to a distinction without difference; individuals foregoing their right to litigate federal

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[1] *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

[2] *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005).

[3] *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183-84 n.2 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997).

[4] *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 n.2 (4th Cir. 1999); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997).

statutory claims by agreeing to arbitrate employment-related disputes are, by necessary implication, waiving their right to a jury trial on these issues.

Contrary to Respondents' erroneous assertion, there exists a demonstrable division among the circuits involving application of the knowing and voluntary waiver of the right to a jury trial standard when scrutinizing a pre-dispute arbitration agreement in the employment context. *Compare Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) *with Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 306-07 (4th Cir. 2001) (rejecting application of a standard requiring the knowing and voluntary waiver of the right to a jury trial by party resisting arbitration); *see also Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (recognizing the "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."). That split should be resolved by this Court.

CONCLUSION

Ryan's petition for writ of certiorari should be granted.

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November 3, 2005

Supreme Court, U.S.
FILED
NOV 17 2005
OFFICE OF THE CLERK

No. 04-1672

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9 U.S.C. §§ 1 *et seq* 2

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, Ryan's Family Steak Houses, Inc. (hereinafter "Ryan's"), respectfully submits the following supplemental brief in support of its petition for a writ of certiorari pursuant to Supreme Court Rule 15(8). Ryan's makes this supplemental filing in order to make the Court aware of the Eleventh Circuit's recent decision in *Caley v. Gulfstream Aerospace Corp.*, ___ F.3d ___, No. 04-14463, 2005 WL 2840372 (11th Cir. Oct. 31, 2005).

The *Caley* case is important because it further amplifies the distinct split which currently exists among the United States Courts of Appeal with respect to the application of the heightened knowing and voluntary waiver standard when scrutinizing arbitration agreements.[1] In opposing review by this Court, the Respondents erroneously maintain that no such split exists. As *Caley* makes clear, that position is without merit.

In *Caley*, the Eleventh Circuit affirmed the district court's grant of a motion to compel arbitration in part by rejecting the plaintiffs' argument that their employer failed to secure their knowing and voluntary waiver of their right to a jury trial when promulgating the company's pre-dispute arbitration program. *Id.* at ** 8-9. The Eleventh Circuit found this

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[1] The Sixth Circuit below invalidated the Ryan's arbitration program on a nationwide basis by holding, *inter alia*, that Ryan's failed to demonstrate it procured a "knowing and voluntary" waiver of its employees' right to a jury trial on their statutory employment claims when they executed the arbitration agreements at issue. *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370,381 (6th Cir. 2005). This heightened standard emanates from *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994).

standard to be irreconcilable with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and noted its rejection was in accord with decisions out of the Fifth, Fourth and Seventh Circuits, *Id.* (citing *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002); *Syndor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1991)), but acknowledged it was in direct conflict with the very Sixth Circuit decision from which Ryan's seeks review by this Court. *Id.* at n.14 (citing *Walker*, 400 F.3d at 381 (6th Cir. 2005)).[2]

The division among the circuits could not be more clear as this latest opinion from the Eleventh Circuit demonstrates.

CONCLUSION

Ryan's petition for writ of certiorari should be granted.

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[2] The Eleventh Circuit additionally noted the Ninth Circuit also adopted this heightened standard. *Id.* (citing *Lai*, 42 F.3d at 1305 (9th Cir. 1994)).